(15,609.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 118.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. C. SIMMONS, ADMINISTRATOR OF ALLEN A. CAMPBELL, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the October term, 1893, thereof, between J. S. Simmons, administrator of the estate of Allen A. Campbell, deceased, plaintiff, and The Missouri Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said The Missouri Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., within thirty days from the date of signing the citation in said cause, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 28th day of May, in the year of our Lord one thousand eight hundred and ninety-four.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, central division, dated as aforesaid.

{ Seal of the United States Circuit Court for the Western District of Missouri, Central Division. }

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri.

Allowed by—
FRANCIS M. BLACK, *Judge.*

b [Endorsed:] No. —. United States circuit court, western district of Missouri, central division. J. C. Simmons, adm'r, *vs.* Missouri Pacific Railway Company. Writ of error to the supreme court of the State of Missouri. Returned and filed 29 day of May, 1894. Jno. R. Green, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Seal of the Supreme Court of Missouri.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court of the State of Missouri, at the city of Jefferson, this 12th day of June, A. D. 1894.

—— ——, *Clerk.*

c The United States of America to J. C. Simmons, administrator of the estate of Allen A. Campbell, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days after the date of signing of this writ, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The Missouri Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Francis M. Black, chief justice of the supreme court of the State of Missouri, this 28th day of May, in the year of our Lord one thousand eight hundred and ninety-four.

FRANCIS M. BLACK,
Chief Justice.

d [Endorsed:] Supreme court, State of Missouri. J. C. Simmons, adm'r, *vs.* Missouri Pacific Railway Company. Citation. Filed May 29th, 1894. Jno. R. Green, clerk.

UNITED STATES OF AMERICA, *Western District of Missouri,* } *ss:*

I hereby acknowledge due service of the within citation this 28th day of May, A. D. 1894.

DRAFFEN & WILLIAMS &
J. R. EDWARDS,
Attorney- for Defendant in Error.

e In the Supreme Court of the United States, October Term, A. D. 1893.

J. C. SIMMONS, Administrator of Allen A. Campbell, Dec'd, Defendant in Error,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error.

And now, on this 28th day of May, A. D. 1894, comes the Missouri Pacific Railway Company, by its attorney, Wm. S. Shirk, and says that in the record and proceedings aforesaid in the above-entitled cause there is manifest error, in this, to wit:

Section No. 2615 of revised statutes of A. D. 1889 of the State of Missouri, under which the judgment against appellant was rendered and affirmed by the supreme court of the State of Missouri, is void,

because it is contrary to the Constitution of the United States, in this:

1st. It impairs the obligation of the contract between the State of Missouri and the defendant contained in its charter, by the terms of which it is impliedly agreed that defendant might and could use fire for the purpose of generating steam to propel its locomotives and cars, and thereby became responsible only for the negligent and careless use thereof.

2nd. It denies defendant the equal protection of the laws.

3rd. It takes defendant's property without due process of law.

And the said Missouri Pacific Railway — prays that the judgment aforesaid may be reversed and annulled and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of the said judgment.

WM. S. SHIRK,
Attorney for Plaintiff in Error.

[Endorsed:] Filed May 29, '94. Jno. R. Green, cl'k.

1 CAMPBELL, Resp., *v.* MO. PAC. R'Y CO., App. } 6128.

Be it remembered that heretofore, to wit, on the 29th day of September, 1891, there was filed in the office of the clerk of the supreme court of the State of Missouri a certified copy of the judgment of the Moniteau county circuit court and the order granting the appeal in a certain cause wherein A. A. Campbell is respondent and The Missouri Pacific Railway Company is appellant; which said certified copy is in words and figures as follows, to wit:

STATE OF MISSOURI, *County of Moniteau.*

Proceedings in the circuit court of Moniteau county, Missouri, at a term begun and held in the city of California, county and State aforesaid, on the seventh day of September, 1891, before the Honorable E. L. Edwards, judge of the first judicial circuit of the State of Missouri.

ALLEN A. CAMPBELL, Plaintiff,
against
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Be it remembered that heretofore, to wit, on the eleventh day of September, 1891, it being the fifth day of the September term, 1891, of the said Moniteau county circuit court, the following proceedings were had and made of record in the above-entitled cause, to wit:

2 ALLEN A. CAMPBELL, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Now, at this day, this cause coming again on to be tried, come

again the parties herein, both plaintiff and defendant, by their respective attorneys, and thereupon come again the jurors aforesaid, and all and singular the premises being seen and heard and by the jury fully understood, the jurors aforesaid, on their oath aforesaid, say they find the issues for the plaintiff and assess his damages at the sum of thirty-eight hundred and seventy-three dollars.

Wherefore it is considered by the court that plaintiff have and recover of the said defendant, The Missouri Pacific Railway Company, the said sum of thirty-eight hundred and seventy-three dollars, the damages so assessed by the jury as aforesaid, together with his costs in this behalf laid out and expended, and that he have execution therefor.

And afterwards, to wit, on the said eleventh day of September, 1891, it being the fifth day of said September term, 1891, of said Moniteau county circuit court, the following further proceedings were had and made of record in said cause, to wit:

ALLEN A. CAMPBELL, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Now, at this day, comes the defendant, by W. S. Shirk, its
3 attorney, and files affidavit and bond for an appeal; which said bond is by the court approved, and defendant is now here granted an appeal to the supreme court of the State.

STATE OF MISSOURI, } *ss:*
County of Moniteau, }

I, O. M. Taylor, clerk of the circuit court within and for the county of Moniteau aforesaid, hereby certify that the foregoing is a full and true copy of the judgment and order granting an appeal in the above-entitled cause as fully as the same appears of record in my office.

In witness whereof I have hereunto set my hand as clerk and affixed the seal of our said circuit court, at office,
[SEAL.] in the city of California, this 26th day of September, 1891.

O. M. TAYLOR,
Circuit Clerk.

And afterwards, to wit, on the 14th day of October, 1892, the following proceedings were had in said cause, to wit:

A. A. CAMPBELL, Resp.,
v.
MO. PAC. R'Y CO., App.

Come now the said parties, by attorneys, and suggest the death of A. A. Campbell, respondent herein; thereupon comes J. C. Simmons, administrator of said decedent, and enters his voluntary appearance herein, and, upon motion and by consent of said parties,

it is ordered by the court that this cause stand revived in his name.

4 Which said suggestion of death is in words and figures as follows, to wit:

In the Supreme Court of the State of Missouri, October Term, 1892.

A. A. CAMPBELL, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

It is hereby mutually stipulated and agreed by and between the parties hereto that the respondent in the above-entitled cause, A. A. Campbell, has died since the granting of the appeal in this case.

It is therefore further stipulated and agreed that this action shall stand revived in the name of J. C. Simmons, administrator of the said A. A. Campbell, and both the respondent and the appellant do hereby enter their voluntary appearance to this action as revived and consent to such revivor in the name of the said administrator.

WM. S. SHIRK,
Att'y for Appellant.
DRAFFEN & WILLIAMS,
EDWARDS & DAVIDSON,
Att'ys for Respondent.

And afterwards, to wit, on the 20th day of November, 1892, there was filed in said cause the appellant's abstract of the record under rule 11 of said supreme court, which is in words and figures as follows, to wit:

5 In the Supreme Court of the State of Missouri, October Term, 1892, Division No. 1.

ALLEN A. CAMPBELL, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant. } No. 6123.

This action was originally brought in the circuit court of Moniteau county, returnable to the March term, 1889, of that court, and is to cover damages for the destruction by fire of plaintiff's dwelling-house, storehouse, stable, stock of goods, etc., at Centretown, in Moniteau county, Mo., on the second day of August, 1888. The petition in the case is as follows:

In the Circuit Court of Moniteau County, Missouri, March Term, 1889.

ALLEN A. CAMPBELL, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Plaintiff states that the defendant is now and was at the time hereinafter stated a corporation duly created and organized under the laws of the State of Missouri, and was then and still is running, operating and managing a railroad between the city of St. Louis

and the city of Kansas, both in the State of Missouri and that defendant's said railroad passes through the counties of Moniteau and Cole in said State; that the plaintiff heretofore, to wit, on the second day of August, 1888, was the owner of a frame dwelling-house situated on lots six and seven (6 and 7) in the town of Centertown, county of Cole and State of Missouri, of the value of thirty-five hundred dollars, which said dwelling-house was surrounded by a plank fence, and the grounds on which it was situated was set with shrubbery, shade trees and flowers, which said fence, shade trees and flowers were of the value of five hundred dollars and was the property of this plaintiff.

Plaintiff further states that at the time aforesaid plaintiff was also the owner of a farm building used as a storehouse situated on lot number five (5) in said town of Centertown, of the value of fifteen hundred dollars, in which said storeroom there *were* divers
6 goods, wares and merchandise on the day aforesaid of the value of twenty-five hundred dollars, the property of this plaintiff. And plaintiff further states that at the time aforesaid he was also the owner of a certain stable and fence situated on lots eleven (11) and twelve (12) of the value of five hundred dollars. That defendant's said railroad passes through said town and near to the plaintiff's said property. That the defendant carelessly and negligently permitted sparks and coals of fire to escape and be thrown from one of its engines which was passing the plaintiff's said property, upon defendant's said railroad at about one o'clock p. m. on the said second day of August, 1888, and the sparks and coals of fire so carelessly and negligently permitted by defendant to escape and be thrown from said engine set fire to certain buildings situated upon the side of its railroad and said fire was thereby communicated to the plaintiff's said property and in consequence of the defendant's carelessness and negligence in permitting said coals and sparks of fire to escape from its said engine as aforesaid the plaintiff's said dwelling-house of the value of thirty-five hundred dollars, also the shade trees, shrubbery and fence and flowers of the value of five hundred dollars, situated on said lots six and seven (6 and 7), also the storehouse, situated on lot number five (5) of the value of fifteen hundred dollars and the goods, wares and merchandise therein contained of the value of twenty-five hundred dollars, also the stable and fence situated on said lots numbered eleven and twelve (11 and 12) of the value of five hundred dollars, were burned and totally destroyed, to the plaintiff's damage in the sum of eight thousand five hundred dollars, for which amount he asks judgment against the defendant together with his cost and charges in his behalf laid out and expended.

DRAFFEN & WILLIAMS,
EDWARDS & DAVISON,
Plaintiff's Attorneys.

The answer was a general denial. After an appeal was perfected by the railway company to the supreme court of the State of Missouri, the attorneys for the respective parties entered into the follow-

ing stipulation with reference to the making of the abstract of the record in the case :

In the Supreme Court of Missouri, Oct. Term, 1892.

A. A. CAMPBELL, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Stipulation.

Whereas, the appellant in the above-entitled cause, does not propose, upon the hearing thereof, in the supreme court, to question the sufficiency of the evidence to support the verdict, as to the fact of the property described in the petition having been burned by fire, which escaped from the defendant's locomotive, nor as to the value of the property destroyed, as found by said verdict, and

Whereas, the evidence upon these points is very volumi-
7 nous, and if printed would not tend to throw any light upon either of the legal propositions, which are involved in said case :

It is therefore stipulated and agreed, by and between the respective parties to said suit, by their respective attorneys, that the appellant's abstract of the record, need not contain any of the evidence as to either of said matters. The respondent, however, to have the right to print any evidence that counsel may deem necessary after seeing points made in appellant's brief.

In witness whereof, we have hereunto set our hands this the — day of September, A. D. 1892.

(Signed) EDWARDS & DAVIDSON,
DRAFFIN & WILLIAMS,
Attorneys for Respondent.
WM. S. SHIRK,
Attorney for Appellant.

In accordance with the foregoing stipulation, the evidence with reference to the origin of the fire, whether set out by appellant's locomotives and engines or not, and as to value of the property destroyed, will be omitted from this abstract of the record, the weight and credibility of this evidence having been passed upon by the jury. It is sufficient to say that some 12 or 13 witnesses testified to facts which tended to show that the fire was set out by the appellant's locomotives, and some 23 or 25 witnesses testified to facts which tended to prove that the fire originated on the inside of the building, and was not communicated by the appellant's engines.

The evidence as to the value of the property destroyed varied from $3,500 to $7,500. The jury, as will be more fully stated hereafter, found a verdict for the plaintiff for $3,873.

The Trial.

ALLEN A. CAMPBELL, plaintiff, in his own behalf, testified as to ownership of the property described in the petition, and its value.

and the city of Kansas, both in the State of Missouri and that defendant's said railroad passes through the counties of Moniteau and Cole in said State; that the plaintiff heretofore, to wit, on the second day of August, 1888, was the owner of a frame dwelling-house situated on lots six and seven (6 and 7) in the town of Centertown, county of Cole and State of Missouri, of the value of thirty-five hundred dollars, which said dwelling-house was surrounded by a plank fence, and the grounds on which it was situated was set with shrubbery, shade trees and flowers, which said fence, shade trees and flowers were of the value of five hundred dollars and was the property of this plaintiff.

Plaintiff further states that at the time aforesaid plaintiff was also the owner of a farm building used as a storehouse situated on lot number five (5) in said town of Centertown, of the value of fifteen hundred dollars, in which said storeroom there *were* divers
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DRAFFEN & WILLIAMS,
EDWARDS & DAVISON,
Plaintiff's Attorneys.

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In the Supreme Court of Missouri, Oct. Term, 1892.

A. A. CAMPBELL, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Stipulation.

Whereas, the appellant in the above-entitled cause, does not propose, upon the hearing thereof, in the supreme court, to question the sufficiency of the evidence to support the verdict, as to the fact of the property described in the petition having been burned by fire, which escaped from the defendant's locomotive, nor as to the value of the property destroyed, as found by said verdict, and

Whereas, the evidence upon these points is very volumi-
7 nous, and if printed would not tend to throw any light upon either of the legal propositions, which are involved in said case :

It is therefore stipulated and agreed, by and between the respective parties to said suit, by their respective attorneys, that the appellant's abstract of the record, need not contain any of the evidence as to either of said matters. The respondent, however, to have the right to print any evidence that counsel may deem necessary after seeing points made in appellant's brief.

In witness whereof, we have hereunto set our hands this the — day of September, A. D. 1892.

(Signed) EDWARDS & DAVIDSON,
DRAFFIN & WILLIAMS,
Attorneys for Respondent.
WM. S. SHIRK,
Attorney for Appellant.

In accordance with the foregoing stipulation, the evidence with reference to the origin of the fire, whether set out by appellant's locomotives and engines or not, and as to value of the property destroyed, will be omitted from this abstract of the record, the weight and credibility of this evidence having been passed upon by the jury. It is sufficient to say that some 12 or 13 witnesses testified to facts which tended to show that the fire was set out by the appellant's locomotives, and some 23 or 25 witnesses testified to facts which tended to prove that the fire originated on the inside of the building, and was not communicated by the appellant's engines.

The evidence as to the value of the property destroyed varied from $3,500 to $7,500. The jury, as will be more fully stated hereafter, found a verdict for the plaintiff for $3,873.

The Trial.

ALLEN A. CAMPBELL, plaintiff, in his own behalf, testified as to ownership of the property described in the petition, and its value.

During the course of his cross-examination, he was asked the following questions:

Q. Do you know Scott Freasher?

A. Yes, sir.

Q. I will ask you if you did not state to him in Centretown on the day of this fire, that the buildings were not set on fire by any engine, but that you were satisfied that they were set on fire by somebody?

A. No, I did not; I never had any such conversation.

Q. And did you not tell him and others and in the presence of others that you could lay your hand on the man that set the buildings on fire?

A. No, sir.

Q. Did not you say that you had rather be in your place, having lost what you had, than to be in the place of that man?

A. I never had any such conversation with that young man in my life.

Q. Did you not state to about the same effect as that to L. A. Shull?

Plaintiff's attorney objected to the above question, saying, "If he is going to try to impeach the witness, we are entitled to
8 the language." Attorney for defendant stated to the court as follows: "Your honor will remember that this is the plaintiff in the case."

The COURT: I think the objection is well taken.

Thereupon the court sustained the objection made by plaintiff's attorney and refused to permit the witness to answer the question, to which ruling and action of the court the defendant objected, and then and there excepted at the time.

Mr. WM. ANDERSON testified as to the origin of the fire, and during the examination stated that he had run down to the Seiffert building, and Wes. Pear and some one else had broke one panel in the door—had gone in and was coming out hallooing that the fire was on the roof. The defendant objected to the witness stating what Pear said. Thereupon plaintiff's attorney asked him the following questions:

Q. Where was he coming from?

A. Upstairs.

Q. He was in the building?

A. Yes, sir.

Q. State what he said.

Defendant's attorney objected to the witness stating what Pear said, because the same was hearsay, irrelevant and immaterial.

The COURT: He can tell what he said when he was in the house.

Thereupon the court overruled defendant's said objection, to which the defendant objected and excepted. Thereupon the witness answered:

"He was coming out hollering that the fire was on the roof."

Mrs. WM. ANDERSON also testified as to the origin of the fire, but as no objection was raised to the competency of any of her testimony, the same is not copied here.

Thereupon the plaintiff offered one WESLEY PEAR as a witness in his behalf and asked the said witness the following question:

Q. Where do you live?

Judge Shirk, attorney for defendant, thereupon said: "I would like to ask the witness a few questions in regard to his competency."

The COURT: Very well, sir.

By Judge SHIRK:

Q. Your name is Wesley Pear?

A. Yes, sir; John Wesley Pear.

Q. You were convicted in Cole county of the crime of grand larceny and sent to the penitentiary in 1872?

A. Yes, sir.

Q. You were pardoned out under the three-fourths rule, were you not?

A. Yes, sir.

Q. Staid in there only three-quarters time?

A. Yes, sir.

Thereupon defendant's attorney objected to the competency of the witness and offered in evidence a certified copy of the judgment of his conviction and his sentence to imprisonment in the penitentiary.

Judgment and Sentence.

9 The certified copy need not be printed here in full. It is in the usual form, dated at the December adjourned term, 1872, of the circuit court of Cole county, and shows that on the 15th day of February, 1876, the said John Wesley Pear was found guilty of grand larceny by a jury of twelve good and lawful men, and that judgment of conviction was thereupon entered in said case of the State of Missouri against John Wesley Pear for the offense of grand larceny and sentence of imprisonment pronounced against him in the penitentiary of the State of Missouri for a period of three years.

After the record of said conviction was read in evidence, Mr. Williams, attorney for the plaintiff, offered in evidence a general pardon issued by the governor of the State of Missouri, and also the pardon issued by the State of Missouri under the three-fourths rule. Thereupon, the defendant's attorney objected to the introduction of said pardons in evidence for the following reasons: The last pardon being the general pardon offered, seems to have been issued on the 25th day of February, 1891; the record of conviction already read in evidence shows that the defendant was convicted at the December term, 1875, of the Cole county circuit court, and was sentenced for three years. This conviction renders him wholly incompetent to testify as a witness in this case, and the governor of the State of

Missouri had no right to pardon him for an offense of which he had already suffered punishment and been discharged, long years after the termination of the term of his sentence. He was pardoned under the three-fourths rule on the 15th day of May, 1878, and that ended the authority of the governor, in his case; that it was not competent nor within the authority of the governor of the State to grant him a further pardon, years after the term of his imprisonment had expired, for the mere purpose of restoring his competency to be sworn as a witness, although the governor of the State may have had such power during the continuance of his imprisonment.

Defendant also objected to the introduction of the pardon under the three-fourths rule for the reason that such pardon did not restore or purport to restore the said John Wesley Pare to his rights as a citizen. The court ruled that the pardon under the three-fourths rule was not a pardon, and that the power still remained in the governor to remove the disabilities of the said John Wesley Pare by an absolute pardon at any time, and overruled defendant's objection to the said John Wesley Pare testifying as a witness, to which action and ruling of the court, the defendant objected and then and there excepted at the time.

The pardon under the three-fourths rule is dated on the 15th day of May, 1878, and signed by the governor, J. S. Phelps, and attested by Michael K. McGrath, secretary of state, and purports to release, discharge, and forever set free, John W. Pare, who had been sentenced to imprisonment in the penitentiary for a term of three years for the offense of grand larceny, and to entitle the said Pare to all the rights, privileges and immunities, which by law attach to and result from the operation of the said pardon.

The said general pardon is dated on the 25th day of February, 1891, and is signed by the governor, David R. Francis, and attested by A. A. Lesueur, secretary of state, and purports to pardon for restoration to citizenship the said Pare, who was at the February call term, 1876, by the judgment of the circuit court of Cole county, sentenced to imprisonment in the penitentiary for the term of three years for the crime of grand larceny, and to entitle the said Pare to all the rights, privileges and immunities which by law attach to and result from the operation of said pardon, and further recites that the said Pare had been discharged from said penitentiary, on the 15th day of May, 1878.

Thereupon the said witness PARE testified as to the origin of said fire to the effect that he heard one Mr. Handley crying "fire" and he looked around and saw smoke on Mr. Seiffert's building; that the smoke came from just one place on the building; that he tried to open the door of the building, but found it locked. That he broke out a panel and went in; that he went to the door leading to the staircase at the northwest end of the building; that he went up the stairs to the upper part of the house, and there saw a hole burned in the roof about the size of a water bucket; that he saw that the fire was all on the top of the roof, and that he then went out and got upon the roof of the building; that he was the first

man on the top of the building; that he saw where cinders had burned scars in the shingles.

On cross-examination, the said witness very positively stated that the fire originated on the outside of the roof, and that when he first went upstairs there was no fire on the floor or the ceiling of the building.

At the close of plaintiff's evidence, W. A. BRADLEY on behalf of defendant testified that he was a locomotive engineer, and had been for about 23 years. That he was in the employ of the Mo. Pac. R'y Co., on the 2nd day of August, 1888, and that he was engineer on train No. 5 on that day. That he was well acquainted with one Walter Knaus; that said Knaus was a locomotive engineer and had been for 18 years; that he was always considered a first-class engineer, careful and competent to run an engine. Witness further testified that the number of the engine which he run that day was No. 998; that it was a Baldwin engine built in Philadelphia; had run about four years, that it had been in the shops in St. Louis, Mo., on the 28th day of July, and had been overhauled and that it was the same as a new engine, and in perfect condition; that it had all known appliances and attachments for preventing the escape of fire — the best appliances and the latest.

On cross-examination, the witness testified that all the engines of the Mo. Pac. R'y Co. were provided with the same appliances to prevent the escape of fire that this one was, and that they were all kept in perfect trim; that he could not say that all the Missouri Pacific engines were so perfectly safe as never to permit fire to escape; that he had sometimes seen fire in the grass along the side of the road, but not very often. Engine No. 998 threw very little fire.

11 WALTER KNAUS, on behalf of defendant, testified that he was a locomotive engineer and had been since August, '79; that on August 2, 1888, he run train No. 121; that he was acquainted with W. A. Bradley, engineer, and had known him some 17 or 18 years. Bradley was considered a good, competent engineer, a first-class engineer and competent to run and manage an engine. That on August 2, 1888, the witness was running engine No. 874. It was a Baldwin six-wheel engine in first-class condition; it had just been out of the shops about a week. It had all of the known appliances for the prevention of the escape of fire that were known at that time. The stack was in first-class shape, the flue, ash-pan and everything was in first-class shape.

On cross-examination, the witness was asked the following question-:

Q. They do sometimes actually set grass afire?

A. I don't know about that; I don't go back to see where the engine sets the grass afire or what it sets afire.

Q. Do you go along the road sometimes and see the fire burning the grass along the road?

Defendant objected for the reason that it was immaterial and incompetent, the question being whether or not one of defendant's engines set the fire to the plaintiff's property on that day at Centertown. The court overruled defendant's objection and permitted the witness to further testify as follows:

Q. Now, about that time—just about that time, don't you know that these engines of that kind threw fire out along the side of the road?

A. I have seen fire where it was in the grass, and where there had been fire, but I can't say whether it was set out by the engine. I don't know what set the fire out.

Q. You know that you sometimes set fire out by engines of this kind?

A. No, sir; I don't know that.

Q. You say you saw where fire had been; didn't you say that you had seen where engines set fire along the line of the road in the grass?

A. No, sir; I didn't say that.

Q. But they do it often?

A. I know there was some grass burned there.

CHARLES DURNELL testified on behalf of the defendant that he was engine inspector in August, '88, and in the employ of the defendant railway company, but that he was now the manager of a brick yard. As inspector of engines it was his duty to look over all the broken machinery if there is any that comes in, and make a report of it, if it needs repairing, and after they are repaired he inspects the engine to see that it is properly repaired; that he had inspected engine No. 998 about August, '88, that it was then in perfect order, that the condition of the engine three to five days after that time was the same—in perfect order.

12 A. B. VETTER testified in behalf of defendant: I am engine inspector for the Missouri Pacific Railway and also M. K. & T. Railway Companies, and was so in August, 1888. I did not bring the record of my inspections with me, but, to the best of my recollection, the pusher engines that pushed the trains at Centertown on the 2 of August, 1888, was in good condition before the fire and after the fire at that place. The pusher engine came into Sedalia about every two weeks or three, to be washed out, repaired and inspected. I always inspected it every time it came in. This pusher engine was furnished with all the known appliances and attachments of engines for the purpose of preventing the escape of fire. I inspected this engine frequently, and on the day of the fire I was especially instructed to examine the smokestack and the ash-pan. The engine came into Sedalia for inspection and to be washed out the day of the fire, to the best of my recollection. When it came in it was in good condition.

On cross-examination the witness stated that he remembers about the time of the fire and that he was cautioned to examine the engine on that account, so as to be sure it was in good shape. I also ex-

amined the fast mail engine at the same time. I examined it and the pusher on account of this fire, and found them in good condition. Engine No. 998 was the fast mail engine. It was one of the latest improved engines. I never saw it in a bad condition. The railway company does not put out the old broken-down engines for pushers. They put out good engines, some of the best of them for pushers.

The defendant rested.

In rebuttal plaintiff recalled Mrs. T. A. GREENUP, and asked her the following question:

Q. Now, just a short time before the Centertown fire that consumed Mr. Campbell's buildings and others, state whether or not the engines had set out any other fires near Centertown that you know?

Defendant's attorney objected to the question on the ground that it is improper, incompetent and irrelevant, and not properly in rebuttal. The court overruled the objection and the defendant duly excepted.

Thereupon the witness testified that about two weeks before the fire that burned Mr. Campbell's building she had a piece of carpet out close to the house. There was also some corn shucks laying on the ground, and the cinders and coals from the engine set the carpet and the corn shucks on fire. The witness took a bucket of water and put them out. This was right in front of her door, in front of the rock crossing between her house and Mr. Campbell's house.

Witness was then asked the following questions:

Q. Do you know of any other instance?
A. I had my clothes hanging out when I was washing and went to get some of my garments——

By DEFENDANT'S COUNCIL:

Q. Was this since the fire?
A. Yes, sir.

13 Defendant objected to the question because it was immaterial, irrelevant and incompetent. The court overruled the objection and defendant excepted.

Thereupon the witness testified that she went out to gather in the clothes, and in some of them she saw cinders, and in one piece there was as much as a pint of cinders. This was back of Mr. Campbell's store.

WILLIAM SWEARENGIN in behalf of plaintiff testified as follows:

Q. Where do you live?
A. About four miles northwest of Centertown.
Q. Do you remember the time of the Centertown fire?
A. I wasn't there when the fire occurred.
Q. Now, I will ask you if about that time you have known of de-

fendant railroad engines setting out fires in other places in that vicinity.

Defendant's counsel objected to the question on the ground that the question was immaterial, irrelevant and incompetent. The court overruled the objection and the defendant duly excepted.

Thereupon the witness answered:

A. Every year frequently, for a good while, along there—along the railroad—pretty near every week there is a fire along there that comes out of the engines. I have seen fire fly from the pusher and other engines that come along there and burn fences and patches of grass for 30 or 40 yards from the track.

Thereupon plaintiff closed in rebuttal.

At the request of the plaintiff the court instructed the jury in his behalf as follows:

I.

"The jury are instructed that while it devolves upon the plaintiff to prove that the fire by which his property was destroyed was started by the sparks from a locomotive engine of the defendant, still it is not necessary that this should be proved by direct and positive evidence, nor that it should be established beyond a reasonable doubt, but if the jury believe from all the facts and circumstances detailed in evidence, that the plaintiff's property, on the second day of August, 1888, was destroyed by fire communicated by a locomotive engine in use of defendant's railroad, then they will find the issues for the plaintiff.

II.

"If the jury believe from the evidence that the plaintiff, A. A. Campbell, was the owner of a storehouse with a stock of goods therein, and of a dwelling-house, a barn, a lot of fencing around his yard, and of a quantity of shrubbery therein, all in the village of Centertown; and that on the second day of August, 1888, the plaintiff's said property was destroyed by fire communicated by a locomotive engine in use of defendant's railroad, to the building known as the Seiffert building, and from that building to the plaintiff's buildings and other property, then the jury will find the issues for the plaintiff and assess his damages at the value of his property destroyed by said fire at the time it was so destroyed."

14 The defendant objected to said instructions being given to the jury, but the court overruled the objection and gave said instructions to the jury; to which action and ruling of the court the defendant duly excepted.

At the request of the defendant the court instructed the jury as follows:

No. 1.

"The court instructs the jury that it devolves upon the plaintiff to prove to the satisfaction of the jury, by a preponderance of the

evidence that the plaintiff's property was destroyed by fire communicated to it by one of defendant's engines, and unless the jury so believe from the evidence they will find for the defendant."

The defendant also requested the court to instruct the jury as follows:

No. 2.

"On the part of the defendant the court instructs the jury that there are two grounds of liability alleged against defendant in the petition herein, to wit:

"First. That plaintiff's property described in his petition was burned by fire communicated to it by one of defendant's engines.

"Second. That such fire was negligently permitted to escape from its said engines, and that it devolves upon the plaintiff to prove both these allegations to the satisfaction of the jury.

No. 3.

"As to said second ground of recovery, the court instructs the jury that it is not sufficient to warrant them in finding a verdict for plaintiff, that they should believe from a preponderance of the evidence that the plaintiff's property was destroyed by fire which escaped from defendant's engines, but unless the jury further believe from the evidence that such fire escaped from said engine through the negligence of defendant the plaintiff is not entitled to recover, and the jury will find for the defendant.

No. 4.

"As to said second ground of recovery, the court instructs the jury that it is not sufficient to warrant them in finding a verdict for the plaintiff that they should believe from a preponderance of the evidence that plaintiff's property was destroyed by fire which escaped from one of defendant's engines, but unless the jury further believe from a preponderance of the evidence that such fire escaped from said engine through the negligence of the defendant the plaintiff is not entitled to recover, and the jury will find for the defendant.

"Although the jury may believe from the evidence that the fire escaped from defendant's engine which burned the plaintiff's property, yet if the jury further find from the evidence that the engine from which it escaped was at the time in good order and repair and was furnished with the best appliances to prevent the escape of fire, and that it was managed by skillful and careful servants, who were at the time managing it with care and skill, then the plaintiff cannot recover, and the jury will find for the defendant.

15 No. 6.

"If the jury believe from the evidence that the fire did escape from one of defendant's engines, and burned plaintiff's property, then they may infer from that fact, that defendant was guilty of negligence in permitting it to escape, but such inference of negligence may be fully overcome by defendant's showing to the satisfaction of the jury that its said engine was in good order and repair,

and that the best contrivances were used upon it to prevent the escape of fire, and that it was run and operated by careful and competent servants, who were at the time managing it with care and skill. And if the jury believe from the evidence, that said engine was in good order and repair and that the best contrivances and appliances were used upon it to prevent the escape of fire, and that it was run and operated by careful and competent servants, who managed said engine carefully and skillfully at the time, then plaintiff cannot recover herein without proving affirmatively and by a preponderance of the evidence, other acts of actual negligence to the satisfaction of the jury.

"Negligence is a fact to be proven like any other fact, and before the plaintiff can recover in this action he must affirmatively prove to the satisfaction of the jury, that the defendant was guilty of negligence in permitting the fire to escape and that such fire consumed plaintiff's property."

But the court refused to give said instructions to the jury, to which action and ruling of the court the defendant duly excepted.

Under the instructions of the court, the jury found a verdict for the plaintiff. Within four days after the rendition of the said verdict, to wit, on the 11th day of September, 1891, the defendant filed its motion for a new trial, which motion is in words and figures as follows, to wit:—

"Comes now the defendant and moves the court to set aside the verdict and judgment rendered in above-entitled cause and to grant the defendant a new trial herein, for the reasons following, to wit:—

"First. The court erred in overruling the defendant's objection to the introduction of the evidence under the petition.

"Second. The court erred in giving improper evidence on the part of the plaintiff and against the defendant's objection.

"Third. The court erred in overruling the defendant's instruction in the nature of a demurrer to the evidence at the close of the plaintiff's case.

"Fourth. The court erred in refusing to admit proper evidence offered by the defendant.

"Fifth. The court erred in giving to the jury improper instructions prayed by the defendant.

"Sixth. The court erred in refusing to give to the jury proper instructions prayed by the defendant.

16 "Seventh. The verdict of the jury is not supported by the evidence and is against the evidence and the weight of the evidence.

"Eighth. The verdict of the jury is grossly excessive."

On said same day the court overruled the motion for a new trial, to which action and ruling of the court defendant objected and then and there excepted at the time.

The defendant was granted ninety days' time in which to file its bill of exceptions, which time was subsequently extended thirty days, by order of the court, filed with the clerk of the Moniteau county circuit court. Within said time, to wit, on the 29th day of December, 1891, said bill of exceptions was filed.

Defendant in due time filed its bond and affidavit for an appeal to the supreme court, which appeal was duly granted, and this cause is now pending in said court on said appeal.

WM. S. SHIRK,
Attorney for Appellant.

And afterwards, to wit, on the 20th day of December, 1892, there was filed in said cause the appellant's additional abstract of the record, which is in words and figures as follows, to wit:

In the Supreme Court of the State of Missouri, Division No. 1, October Term, A. D. 1892.

ALLEN A. CAMPBELL, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant. } No. 6128.

Additional Abstract of the Record.

It should have been set forth in our abstract of the record, that the fire which destroyed plaintiff's property was first discovered at about two o'clock in the afternoon of Aug. 2d, 1888; Mr. Handley, who seems to have first discovered it, having testified that he noticed it just as mail train No. 1, was pulling into the depot, at one o'clock and fifty-four minutes, or six minutes of two p. m.

17 It should have further stated, that John Flaherty, depot agent at the time of the fire, testified as to the trains that passed through Centertown during the day, as follows: That freight train No. 131 passed Centertown that morning; the fast mail went west at seven o'clock that morning; local freight No. 121 arrived there at eleven o'clock and forty-five minutes, and left at eleven o'clock and fifty-four minutes; at one o'clock and twenty-five minutes No. 5, the local passenger, went west, and the next train was No. 1, that went west at six minutes to two, which was coming into the depot as the fire was discovered.

And afterwards, to wit, on the 24th day of April, 1893, there was filed in said cause the respondent's additional abstract of the record, which is in words and figures as follows, to wit:

In the Supreme Court of the State of Missouri, April Term, 1893.

ALLEN A. CAMPBELL, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant. }

Additional Abstract of the Record by Respondent.

The extract from the testimony of Allen A. Campbell on page 5 of the appellant's original abstract, and the ruling of the court on page 6 are liable to mislead. No point is made in the brief of the appellant predicated upon this ruling. The evidence in reference to the conversation with the witness L. A. Shull was subsequently admitted by the court. The following is a literal copy of the bill of exceptions.

"2." Did you not state to about the same effect as that to L. A. Shull?

Maj. MOORE (attorney for plaintiff): If he is going to try to impeach the witness we are entitled to the language.

Judge SHIRK: Your honor will remember that this is the plaintiff in the case.

The COURT: I think the objection is well taken.

The court sustained the objection made by plaintiff's counsel, to which ruling and action of the court in sustaining same, the defendant by its counsel then and there excepted at the time.

By Judge SHIRK:

Q. Didn't you state to L. A. Shull, in Centretown, on that day, or probably the next day, that you could lay your hand on the man that set fire to those buildings?

A. No sir, I did not; I had no such conversation.

Q. Are you acquainted with I. Nivens?

A. Yes sir.

Q. What is "I" for?

A. Isaiah.

Q. Did you not state to him about that time, in Centretown, that you could put your hand on the man that set those buildings on fire?

A. No sir. It was after I had sued the company; there was considerable talk about this matter, and I had some conversation with him, yes sir.

Q. Did you have this conversation?

A. I did not have that, no sir.

18 Q. What did you have to say?

The witness then detailed the conversation had with Nevins. He was also asked as to conversation with Mike Handley and J. G. Gouge. Shull, Nevins and Gouge were also permitted to testify as to the conversations.

It will be seen that, while the court at first excluded the conversations, he subsequently permitted the inquiry to be made.

While no point is made in appellant's brief in reference to the matter it is well to have the record understood.

The parties have entered into a stipulation, by which, the appellant concedes, that there was sufficient evidence to show, that the property described in the petition was burned by fire which escaped from defendant's locomotive, and that the amount of the verdict was justified by the testimony submitted as to the value of the property, wherefore it was agreed that it was not necessary to print the great volume of testimony taken in the case. It may be best, however, to set out sufficient evidence to show the situation of the property, and the times at which defendant's trains passed through Centretown where plaintiff's buildings were situated. We will therefore present a short abstract of the evidence upon these points.

Allen A. Campbell, the plaintiff, stated that the fire occurred Au-

gust 2nd, 1888, about twenty minutes after one o'clock p. m. That his storehouse faced south, and that Seyfert's building was next to it on the east, and Pares' was next to that; that they also faced south; that these buildings were about seventy feet north of the main track of defendant's railroad, and about forty-five feet from the side track; that the railroad track is located on higher ground than that on which these buildings were situated; that the smokestack of an engine on defendant's railroad would be about even with the top of the buildings.

The witness further stated that about 12.35 p. m. the accommodation train went east; that between that and the time the other passenger train came in, a freight train pulled out; that there was a passenger train in about 1 08 p. m.; that between the time that train went west and the one that went east, there was a freight train pulled in not far from one o'clock; that it was on the side track and was throwing smoke and cinders as it passed through the town; that a pusher engine was usually kept at Centretown; that after the freight train pulled out, the pusher ran down the north side track next to the houses as hard as it could go; that the fireman *that* was running that engine at the time, and he was drunk; that it was throwing smoke and cinders which went into the houses; that after running the pusher down, he ran it back and stopped in front of plaintiff's store; that it threw smoke and cinders into the store to such an extent that the plaintiff went out and asked him to move the engine, which he finally did; that the wind was blowing from the track towards the buildings; that it was a hot day and everything was very dry.

The witness further stated that Seyfert's building adjoined his; that it was locked up; was unoccupied and had not been used for quite a while. The evidence showed that it was locked up when the pusher was in front of the building. A short time after this engine was moved from in front of the buildings, the fire was discovered in the roof of the Seyfert building. The roof of this building slanted east and west. It faced south and had a square front.

There was abundant evidence offered by plaintiff to show that the fire was first discovered in the roof of the Seyfert building and was communicated from that to plaintiff's building.

Defendant upon its part offered evidence tending to show that the fire was not first discovered in the roof, but that it was inside the house. It also offered evidence to the effect that the engines were in good order, &c., but plaintiff elicited facts tending to show that this was not the case.

19 And afterwards, to wit, on the 14th day of October, 1893, the further following proceedings were had in said cause, to wit:

A. A. CAMPBELL, Resp.,
v.
MO. PAC. R'Y CO., App.

Come now the said parties, by attorneys, and submit these causes to the court on briefs.

And afterwards, to wit, on the 23rd day of December, 1893, the further following proceedings were had in said cause, to wit:

A. A. CAMPBELL, Resp.,
vs.
MO. PAC. R'Y *R'y* CO., App.

Now, at this day, it is ordered by the court that this cause be transferred to the court in banc.

And afterwards, to wit, on the 5th day of March, 1894, the further following proceedings were had in said cause, to wit:

A. A. CAMPBELL, Resp.,
vs.
MO. PAC. R'Y CO., App.

Come now the said parties, by attorneys, and submit this cause to the court on briefs.

And afterwards, to wit, on the 24th day of March, 1894, the further following proceedings were had in said cause, to wit:

J. C. SIMMONS, Administrator of the Estate of Allen A. Campbell, Deceased, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Appeal from Moniteau county circuit court.

Now, at this day, come again the parties aforesaid, by
20 their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid in form aforesaid by the said Moniteau county circuit court rendered be in all things affirmed and stand in full force and effect, and that the said respondent recover against the said appellant his costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures following, to wit:

21 In the Supreme Court of Missouri, October Term, 1893.
In Banc.

A. A. CAMPBELL, Respondent,
v.
MISSOURI PACIFIC R'Y CO., Appellant.

This is an action to recover damages, as alleged, by the burning of plaintiff's building, fences, shrubbery, &c., by fire communicated from one of defendant's locomotives. The petition charged negligence on the part of defendant in permitting fire to escape. The answer was a general denial. It is agreed by counsel that the evidence, though circumstantial, tended to prove that the fire which consumed plaintiff's property was communicated from one of defendant's engines while being operated on its road.

The court permitted a recovery under section 2615 of the statute without proof of negligence on part of the defendant.

1. The first proposition insisted upon as ground for reversal of the judgment is that said section 2615, which makes every person and corporation responsible in damages for property injured or damaged by fire communicated directly or indirectly by locomotive engines, in use upon their railroads, without proof of negligence, is unconstitutional.

This objection has received the careful consideration of this court in banc at this term in the case of Matthews *v.* R'y Co., in which the statute in question was held valid. The objection under the authority of that case must therefore be overruled.

It may not be out of place here to take the occasion of stating that in my opinion the statute can be sustained on the broad ground that it is merely remedial in its character and is authorized under the general powers of the legislature to provide appropriate remedies for the redress of such wrongs as are contemplated.

22 "The remedy does not alter the contract or the tort. It takes away no vested right, for the defaulter can have no vested right in a state of the law which left the injured party without or with only a defective remedy." Endlish on Stat. Law, sec. 285.

It is unquestioned that the utmost diligence and care cannot prevent the escape of fire from locomotive engines. We have, then, this condition of things: The corporation is given the right by the statute to run its engines by steam-power, necessitating the use of fire. Fire necessarily escapes and is scattered along the route. The citizen owns property on the line of the road, which is exposed to fire from those engines, regardless of the care and vigilance he may exercise, Both parties are faultless, but nevertheless the property of the owner is consumed by fire from an engine. The property-owner has the right to own the property and to claim protection under the law equal at least to the right of the corporation to use fire on its engines. The loss must necessarily fall upon one or the other of these parties. Which one of them shall suffer the loss—the one through whose agency the damage was caused, though in the lawful use of its own property, or the one equally innocent of wrong and who has no agency in causing the damage? Tested by the rule of natural right and equity, there could be but one answer to the inquiry. This answer is formulated into the maxim that "every one should so use his own property as not to injure that of his neighbor."

Prior to the statute under consideration the loss was made to fall upon the owner, who was innocent of fault in the use and care of his own property and had no part in setting at liberty the destructive agency. The rule was manifestly unjust. To

23 change this rule and place the liability where it should rest is the purpose of the statute. In the language of Dewey, J., in Lyman *v.* R'y Co. (4 Cush., 290), we consider the statute "as one of those general remedial acts passed for the more effectual protection of property against the hazards to which it has become subject by the locomotive engine. The right to use the parcel of land appro-

priated to the railroad does not deprive the legislature of the power to enact such regulations and impose such liabilities for injuries suffered from the mode of using the road as the occasion and circumstances may justify." The statute considered in that case imposed on the railroad company absolute liability for damages caused by fires escaping from engines. So in a recent case in Connecticut the court, in discussing a similar statute, says: "In this view of the case the statute rests upon broad grounds of justice and equity. It is designed to do justice where before there was a partial failure of justice. It is therefore a remedial statute in the best sense, and we must so construe it as to suppress the mischief and advance the remedy." Martin *v.* R'y Co., 62 Nonn., 340.

The contract between the State and the corporation is that the latter may propel its trains by the use of steam generated by fire. There was no agreement that it should be exempt from liability for the consequences resulting to others from its use of fire. In respect to such consequences it is subject to control by remedial laws to the same extent as natural persons.

Fire when uncontrolled is neseccarily destructive of property. As shown in the opinion of Gantt, J., in the Matthews case, *supra*, damage caused by fires was recoverable at common law without proof of negligence. There is no reason why the common law could
24 not or indeed should not be restored in cases in which the lawful use of property by one necessarily exposes the property of others to damage by fire.

A statute of this State declared that "if any person shall wilfully set on fire any woods, marshes, or prairies, so as thereby to occasion any damage to any other person, such person shall make satisfaction for such damage to the party injured, to be recovered in an action on the case." R. S., 1845, p. 1091, sec. 3.

This act came before this court in 1848, and its validity was not questioned, though that distinguished jurist, Leonard, afterwards judge of this court, represented the party charged with the damage. In that case the court held that the fact that the fire was set on defendant's land constituted no defense under the statute, and a recovery without proof of negligence was affirmed. Finley *v.* Langston, 12 Mo., 123.

A similar statute was held valid by the supreme court of Iowa—Conn *v.* May, 36 Iowa, 241.

We think there can be no doubt that the State has the power to impose absolute liability upon one causing loss of property to another by the use of agencies necessarily destructive and in the use of which absolute control is impossible, whether the one using the agency be a private person or a corporation.

II. The petition charged that the fire causing the injury was permitted to escape through the negligence of defendant, and the court permitted a recovery under the statute without proof of negligence. Defendant assigns this action of the court as error, in that it permitted a recovery upon a cause of action different from that charged in the petition. The petition states all the facts necessary to authorize a judgment under the provisions of the statute, and, in

addition thereto, the allegation of negligence. By the statement of more than was required, plaintiff did not forfeit his right to recover upon proof of the facts he was required to state and did state in his petition. Radcliff *v.* R'y, 90 Mo., 131; Morrow *v.* Surber, 97 Mo., 155.

III. During the trial witnesses were permitted to testify, over the objection of defendant, that other fires, both before and subsequent to the one in question, at different places on the line of defendant's road, had been started by sparks from some of defendant's engines. The admission of this evidence is assigned as error.

In Coale *v.* R'y Co., 60 Mo., 227, this court held that in order to prove that one engine was insufficient, or that the employés of the company in charge of such engine were careless or incompetent, evidence was not admissible to prove that other engines were defective and other employés were incompetent or negligent. The ruling in that case is not control-ing on the question of the admissibility of the evidence complained of here, for the reason that the statute creates an absolute liability without respect to the character of the machinery or the competency of the employés. The admission of the evidence was clearly harmless if it only tended to prove want of care on the part of defendant.

The only issue involving the liability of defendant was whether the fire was communicated to plaintiff's property directly or indirectly by a locomotive engine in use upon its road. Was this evidence admissible as tending to prove that issue?

The question was sharply contested on the trial, whether the fire causing the damage did in fact originate from one of defendant's engines? The evidence was all circumstantial. It was im-
26 portant then to show that there was a possibility that sparks may have been thrown a distance sufficient to reach the building in which the fire originated, and that they contained heat enough to set it on fire. The fact that live sparks were thrown from engines and did ignite grass and other combustible materials would tend to prove the probability that the fire was communicated from an engine. It was not shown that the engine, from which alone the fire could have been communicated, was constructed or manned with more care than all others in use on the road.

The admissibility of such evidence was affirmed in Sheldon *v.* Railroad, 14 N. Y., 223, by a divided court.

The court in that case says:

"The competency of this evidence has been directly decided in the English court of common pleas (Piggott *v.* The Eastern Railway Co., 10 Jurist, 571; Aldridge *v.* The Great Western R. R. Co., 3 M. & G., 515). These cases upon this point are well decided. The principle is essential in the administration of justice, inasmuch as circumstantial proof must, in the nature of things, be resorted to, and inasmuch as the jury cannot take judicial cognizance of the fact that locomotive engines do emit sparks and cinders which may be borne a given distance by the wind. The evidence was competent to establish certain facts which were necessary to be established

in order to show a possible cause of the accident and to prevent vague and unsatisfactory surmises on the part of the jury."

This ruling was followed without division in Field *v.* R'y Co., 32 N. Y., 339, and Webb *v.* R'y, 49 N. Y., 421.

A similar ruling was made by the Supreme Court of the United States in Railroad *v.* Richardson, 91 U. S., 470. Mr. Justice
27 Strong, who wrote the opinion of the court, says: "The question has often been considered by the courts of this country and in England, and such evidence has, we think, been generally held admissible as tending to prove the possibility and consequent probability that some locomotive caused the fire." He follows this statement of the law by a number of citations, both English and American, including the case of Shelden *v.* R'y Co., *supra.*

Further on in the same opinion the judge says: "The particular engines were not identified, but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us that, under the circumstances, this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire along their passage."

To the same effect are the following cases: Bowell *v.* R'y Co., 63 N. H., 25; Railroad *v.* Gilbert, 52 Fed. Rep., 711; Thatcher *v.* R'y Co., 85 Mo., 509.

We think the evidence tended to prove the possibility and consequent probability that the fire was communicated to plaintiff's property from one of defendant's engines, and that the evidence was admissible and its probative force was for the determination of the jury. If the issue had been of negligence in the construction or management of the engine only, and the engine which could only have caused the damage had been clearly identified, evidence that other engines emitted sparks and set fires would have been inadmissible under the decisions of this court. Coale *v.* R'y Co., *supra;* Patton *v.* R'y, 87 Mo., 117. But in case the fact whether the fire originated from the engine was alone in issue, and there was no direct proof of the fact, it seems very clear that
28 such evidence would have some tendency to prove that issue. The evidence was all circumstantial, and the facts testified to were circumstances, though slight they may have been, bearing upon the issue.

IV. Defendant insists further that plaintiff was not entitled to recover under the statute for personal property burned, nor for shrubs, trees, and flowers upon which defendant could not obtain insurance. For support of this contention counsel cite Chapman *v.* R'y Co., 37 Maine, 92. The loss considered in that case was of a lot of cedar posts temporarily deposited near the road. The statute made the railroad responsible when a building or other property is injured by the fire communicated by a locomotive engine, and gave to the corporation "an insurable interest in the property along the route for which it is responsible." After discussing the statute the court says: "The conclusion to which we have arrived is that the liability of railroad corporations under this statute extends only to

property permanently existing along their route and capable of being insured, and that as to moveable property having no permanent location the liability of such corporation is to be determined by principles of the common law." In Pratt *v.* Railroad the same court held that the liability of the company under this statute was not confined to real estate, but extended to personal property as well.

Exemption from responsibility under the statute of that State has never extended beyond injury to movable property temporarily placed near the track. In the recent case of Thatcher *v.* R'y Co., *supra*, the supreme court of that State very evidently disapproves the decision in the Chapman case, though it expressly states that it had no intention of overruling.

29 The court agreed that a different construction of the statute had been given by the courts of Massachusetts, Vermont, and New Hampshire from the one declared in the Chapman case.

We do not think so narrow a construction should be given our statute. It is remedial, and such construction should be given it as will advance the remedy. Indeed, the language of the statute is too plain and unambiguous to admit of but one construction. The corporation shall be responsible " to every person or corporation whose property may be injured or destroyed." This language leaves no room for discussion as to the character of the property contemplated; it includes all property that may be injured or destroyed.

We do not think it necessary to the validity of the statute that the railroad corporations should have been given an insurable interest in the property upon the route of their roads, nor does the fact that such interest was given limit their responsibility to insurable property that may be injured or destroyed. The purpose of the law was to give the corporation the same right and opportunity of protection and indemnity from fires as the owner of property had. What property is the subject of insurance must be determined by the insurance companies, whether the indemnity is sought by the owner or by the corporation.

Judgment affirmed. Sherwood, J., dissents. Barclay, J., absent; the other judges concur.

G. B. MACFARLANE.

30 And afterwards, to wit, on the 29th day of May, 1894, the further following proceedings were had in said cause, viz:

J. C. SIMMONS, Administrator of the Estate of Allen A. Campbell, Deceased, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Now, at this day, there is presented to the Honorable Francis M. Black, in chambers, a writ of error to the Supreme Court of the United States; a citation directed to the said respondent, citing and admonishing him to be and appear at a Supreme Court of the United States on the 27th day of June, 1894; an assignment of errors, and a supersedeas bond in the sum of eight thousand dollars, which said writ of error is allowed, said citation signed, and said

bond approved and ordered to be filed and made a part of the record herein.

Which said assignment of errors is in words and figures as follows, to wit:

In the Supreme Court of the United States, October Term, A. D. 1894.

J. C. SIMMONS, Administrator of Allen A. Campbell, Dec'd, Defendant in Error,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error.

And now, on this 28th day of May, A. D. 1894, comes the Missouri Pacific Railway Company, by its attorney, W. S. Shirk, and says that in the record and proceedings aforesaid in the above-entitled cause there is manifest error, in this, to wit:

Section No. 2615 of the Revised Statutes of A. D. 1889 of the State of Missouri, under which the judgment against appel-
31 lant was rendered and affirmed by the supreme court of the State of Missouri, is void, because it is contrary to the Constitution of the United States, in this:

1st. It impairs the obligation of the contract between the State of Missouri and the defendant contained in its charter, by the terms of which it is implicitly agreed that defendant might and could use fire for the purpose of generating steam to propel its locomotives and cars, and thereby became responsible only for the negligent and careless use thereof.

2nd. It denies defendant the equal protection of the laws.

3rd. It takes defendant's property without due process of law.

And the said Missouri Pacific railway prays that the judgment aforesaid may be reversed and annulled and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of the said judgment.

WM. S. SHIRK,
Attorney for Plaintiff in Error.

And which said supersedeas bond is in words and figures as follows, to wit:

Know all men by these presents that we, The Missouri Pacific Railway Company, as principal, and Jesse W. Henry and J. S. Fleming, as sureties, are held and firmly bound unto J. C. Simmons, administrator of the estate of Allen A. Campbell, deceased, in the full and just sum of eight thousand & $\frac{00}{100}$ dollars, to be paid to the said J. C. Simmons, administrator as aforesaid; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of May, in
32 the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at the October term, A. D. 1893, of the supreme court of the State of Missouri, in a suit depending in said court

between J. C. Simmons, administrator of the estate of Allen A. Campbell, dec'd, plaintiff, and The Missouri Pacific Railway Company, defendants, judgment was rendered against the said The Missouri Pacific Railway Company, and the said The Missouri Pacific Railway Company having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said J. C. Simmons, administrator as aforesaid, citing and admonishing him to be and appear at a supreme court of the United States within thirty days from and after the signing of the citation in this cause:

Now, the condition of the above obligation is such that if the said The Missouri Pacific Railway Company shall prosecute said writ to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

THE MISSOURI PACIFIC R'Y CO.,
By WM. S. SHIRK, [SEAL.]
Its Agent and Att'y.
J. S. FLEMING. [SEAL.]
JESSE W. HENRY. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved by—
FRANCIS M. BLACK, *Judge.*

33 STATE OF MISSOURI, *sct:*

I, John R. Green, clerk of the supreme court of the State of Missouri, do hereby certify the foregoing to be a full, true, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same remain on file and of record in my office.

Seal of the Supreme Court of Missouri.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of Jefferson, this 12th day of June, A. D. 1894.

——, *Clerk.*

Endorsed on cover: Case No. 15,609. Missouri supreme court. Term No., 118. The Missouri Pacific Railway Company, plaintiff in error, *vs.* J. C. Simmons, administrator of Allen A. Campbell, deceased. Filed June 25th, 1894.

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Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

THE MISSOURI PACIFIC RAILROAD COMPANY,
Plaintiff in Error,
vs.
J. C. SIMMONS, ADMINISTRATOR OF ESTATE OF ALLEN A. CAMPBELL, DECEASED,
Defendant in Error.

118.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

STATEMENT AND BRIEF OF DEFENDANT IN ERROR.

W. M. WILLIAMS,
Attorney for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

THE MISSOURI PACIFIC RAILROAD COMPANY,
Plaintiff in Error,
vs.
J. C. SIMMONS, ADMINISTRATOR OF ESTATE OF ALLEN A. CAMPBELL, DECEASED,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

STATEMENT OF DEFENDANT IN ERROR.

This action is to recover the damages sustained by the defendant in error, on account of the destruction of his dwelling, storehouse, stock of goods, fences, shrubbery, &c., by fire caused by sparks from one of the defendant's locomotive engines.

The petition or complaint, among other things, alleged that "the defendant carelessly and negligently permitted sparks and coals of fire to escape and be thrown from one of its engines, which was passing the plaintiff's said property, upon defendant's said railroad, about one o'clock on the second of August, 1888, and that the sparks and coals of fire, so carelessly and negligently permitted by defendant to escape, and be thrown from said engine, set fire to certain buildings situated upon its said railroad, and said fire was thereby communicated to plaintiff's said property," which was burnt and destroyed to his damage, &c.

Section 2615 of the Statutes of Missouri, is as follows:

"FIRES FROM ENGINES—DAMAGES. — Each railroad corporation owning or operating a railroad in this State shall be

responsible in damages to every person and corporation whose property may be injured or destroyed by fire, communicated directly or indirectly, by locomotive engines in use upon the railroad owned or operated by such railroad corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages."

The plaintiff's evidence tended to prove all of the allegations of the petition, including actual negligence upon defendant's part, but the trial court ruled that, under the statute above quoted, it was only necessary for him to show that his property was destroyed by fire started by defendant's locomotive engine.

The plaintiff below obtained judgment for the value of his property, and the railroad company appealed to the Supreme Court of Missouri, where the judgment of the trial court was affirmed.

A writ of error was then sued out by the railroad company, and the cause brought to this court.

The errors assigned are as follows:

"Section No. 2615 of Revised Statutes of A. D. 1889 of the State of Missouri, under which the judgment against appellant was rendered and affirmed by the Supreme Court of the State of Missouri, is void, because it is contrary to the Constitution of the United States, in this:

"*First.* It impairs the obligation of the contract between the State of Missouri and the defendant, contained in its charter, by the terms of which it is impliedly agreed that defendant might and could use fire for the purpose of generating steam to propel its locomotive and cars, and thereby became responsible only for the negligent and careless use thereof.

"*Second.* It denies defendant the equal protection of the laws.

"*Third.* It takes defendant's property without due process of law."

The sole question for determination here is the validity of the statute of the State of Missouri quoted above.

BRIEF.

The Statute of Missouri, under consideration in this case, declaring that railroad corporations shall be liable for damages to the property of others, caused by fires started by their locomotive engines, is not in violation of any of the provisions of the Constitution of the United States.

(1) This act is not subject to the objection, that it "impairs the obligation of a contract."

It does not appear in this record when the plaintiff in error was incorporated.

It was within the power of the legislature, however, to make existing, as well as future railroad corporations subject to the provisions of this act.

"Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter contract, removed from the sphere of State regulation, and that the charter implies an undertaking on the part of the State, that in the same way in which their exercise is permissible at first, and under the regulations then existing, and those only, may the corporators continue to exercise their rights, while the artificial existence continues. The obligation of the contract by no means extends so far; but, on the contrary, the rights and privileges which come into existence under it are placed upon the same footing with other legal rights and privileges of the citizen, and subject in like manner to proper rules for their due regulation, protection and employment."

Cooley's Constitutional Limitations (6th ed.), 707–710.

Lyman vs. Railroad, 4 Cush., 288.

Matthews vs. Railway Company, 121 Mo., 298.

Grissell vs. Hoosatonic R. R. Co. (Conn.), 4 New England Rep., 85.

Newton vs. New York & New England R. R. Co. (Conn.), 5 New England Rep., 614.

Ross vs. Railway, 6 Allen, 87.

Hart vs. Railway, 13 Metcalf, 99.

Pratt vs. Railway, 42 Maine, 579.

Union Pacific R'y vs. Debusk (Col.), 3 Lawyers' Reports Annotated, 350.

Rodemacher vs. Railroad, 41 Iowa, 297.

McCandless vs. Railroad Co. (S. Car.), 18 Lawyers' Reports Annotated, 440.

Railway Company vs. Emmons, 149 U. S., 364.

(2) This statute in no manner "deprives the plaintiff in error of the equal protection of the laws," and is not subject to that objection.

Railroad corporations under this act "are brought into the same courts that are provided for other corporations and natural persons, upon like process, and the plaintiff is required to make out his case according to the law of the land."

So long as the State imposes this liability upon the only agency that has like powers, and creates similar hazard, it cannot be charged with inequality or unjust discrimination.

Matthews vs. Railway, supra.

"There is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial or an infringement of the obligations of contracts in the imposition upon them, in particular instances, of the entire expense of the performance of the acts required in the public interest."

Railway Co. vs. Town of Bristol, 151 U. S., 556.

Missouri Pacific R'y Co. vs. Humes, 115 U. S., 512.

Also authorities cited above.

(3) The other objection, that this act "deprives the plaintiff in error of its property without due process of law," is equally untenable.

"Legislation is not necessarily invalid, or in violation of the principle of a just equality before the law, if the one using extra hazardous materials or instrumentalities, which put in jeopardy a neighbor's property, is made by such legislation to bear the risk, and pay the losses thereby occasioned, when there is no fault on the part of the owner of the property, even though negligence in the party employing the dangerous instruments cannot be proved."

Grissell vs. Hoosatonic R. R. Co. (Conn.), 4 New England Rep., 85; and cases cited above.

(4) Similar statutes have been enacted in a number of States, and the constitutionality of such legislation has been questioned upon the same grounds urged here, and the right of the State to pass such laws upheld by the courts of Massachusetts, Maine, Connecticut, Iowa, Colorado, South Carolina and Missouri.

The authorities are collated and the question fully discussed in the very able opinions of the Supreme Court of Missouri in *Matthews vs. Railway*, 121 Mo., 298, and in this case, to which the attention of this court is respectfully called, and an affirmance of the judgment of that court asked.

W. M. WILLIAMS,
Attorney for Defendant in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 118.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

J. C. SIMMONS, Administrator of Allen A. Campbell, deceased.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN.
Counsel for the Railway Co.

C. G. Burgoyne, Walker and Centre Streets, New York.—1896.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1896—No. 118.

THE MISSOURI PACIFIC RAILWAY CO.,
Plaintiff in Error,

AGAINST

J. C. SIMMONS, Executor of Allen A. Campbell, deceased.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This action was brought by Campbell against The Missouri Pacific Railway Company in the Circuit Court of Moniteau County, Missouri, to recover damages for the destruction by fire of plaintiff's dwelling house and other property on August 2d, 1888, which fire, it was alleged in the PETITION (Tr., p. 6), was due to the negligence of defendant's agents and servants, and originated from sparks thrown from one of the engines of the defendant. Plaintiff did not claim a right under any statute. The answer was a general denial, and upon the trial it was agreed by counsel (Tr., p. 7) "that the evidence tended to prove that the fire which consumed plaintiff's property was com-

municated from one of defendant's engines operated on its road" (Opinion, Tr., p. 20). The Court permitted a recovery, without proof of negligence on the part of defendant, under Section 2615 of the Revised Statutes of Missouri of 1889 (Laws 1887, p. 101), which reads as follows:

"*Fires from Engines—Damages.* Each railroad corporation owning or operating a railroad in this State shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it and may procure insurance thereon in its own behalf for its protection against such damages."

A motion for a new trial was overruled and the defendant thereupon took the case by writ of error to the Supreme Court of Missouri, which Court affirmed the judgment below. From that judgment of affirmance the railway company prosecutes this writ of error. The case was brought here under Revised Statutes, Section 709, upon the claim by the railway company that there was drawn in question the validity of the Statute of the State of Missouri above mentioned upon the ground of its being repugnant to the Constitution of the United States, the judgment of the State Court being in favor of the validity of the Statute.

Assignment of Errors.

Section No. 2615 of the Revised Statutes of A. D. 1889 of the State of Missouri, under which the judgment against appellant was rendered and affirmed by the Supreme Court of the State of Missouri, is void,

because it is contrary to the Constitution of the United States, in this:

1st. It impairs the obligation of the contract between the State of Missouri and the defendant contained in its charter, by the terms of which it is implicitly agreed that defendant might and could use fire for the purpose of generating steam to propel its locomotives and cars, and thereby became responsible only for the negligent and careless use thereof.

2d. It denies defendant the equal protection of the laws.

3d. It takes defendant's property without due process of law.

ARGUMENT.

I.

Section 2615 of the Revised Statutes of Missouri, 1889 (Laws 1887, p. 101), **is unconstitutional, in that it impairs the obligation of the contract contained in the charter of the railroad company.**

The plaintiff in error is a railroad company organized and existing under the general railroad law of the State of Missouri, from which it obtained all the powers, rights and privileges which it possesses.

In the sixth clause of Section 2543, Revised Statutes of Missouri, 1889, the following provision is found:

"Privilege is given to railroad companies to take and convey persons and property on their railroad by the power or force of steam, or of animals, or by any mechanical power and to receive compensation therefor."

By this section a valuable franchise was conferred upon the railroad company, to wit.: permission to operate its road by steam, and such franchise cannot be impaired in any degree, except possibly through the operation of the police powers of the State, without impairing the obligation of the contract entered into by the railroad company and the State.

It is unnecessary to argue the question which is now so firmly established in the law of this country as to the character of the charter of a corporation, but reference may simply be made to that line of decisions on this subject, beginning with the cases of Fletcher vs. Peck and Dartmouth College vs. Woodward. The principle itself is well and tersely stated by Cooley in his work on Constitutional Limitations at page 279, as follows:

"Those Charters of Incorporation which are granted for private benefit or purposes of the corporators are held to be contracts between the legislature and the corporators, having for their consideration the liabilities and duties which the corporators assume by accepting them, and the grant of the franchise can no more be resumed by the legislature or its benefits diminished or impaired without the consent of the grantees than any other branch of property or valuable thing, unless the right to do so is reserved in the Charter itself."

The right to amend was not reserved in the charter to The Missouri Pacific Railway Company, nor did such right exist under the laws of the State of Missouri at the time of the incorporation of the company.

The charter cannot be amended unless the right to do so is reserved in the charter itself (Cooley on Constitutional Limitations, p. 337; Railroad Company vs. Carthage, 36 O. State, 631; Trustees vs. Indiana, 14 How., 268; Dartmouth College vs. Woodward, 4 Wheaton, 518; Bank vs. Sharp, 6 How., 627; Scotland Co. vs. R. P. Co., 65 Mo., 135; Sloane vs. R. R., 61 Mo., 24). If the history of that part of the legislation of the State of Missouri which deals with the incorporation of companies be consulted it will be found that that State has expressly contracted in regard to charters granted since 1865 that such charters shall not be amended. The first general law passed in Missouri for the purpose of providing for the incorporation of railroad companies is found in the Revised Statutes of 1855, and such laws did not reserve to the State the right to amend or alter charters thereafter granted, and as to charters previously granted expressly provided that

"the Legislature may at any time alter or amend this chapter, but such alteration or amendment shall not impair the rights of the companies previously organized" (Chap. 39, Section 56).

In the general statutes of 1865 it was provided in Chapter 62, Section 21:

"No charter of any corporation granted by the Legislature of this State shall be altered, suspended or repealed by such legislation unless proof be made satisfactory to the Legislature that notice of such proposed alteration, suspension or repeal has been given to the President, Secretary or other officer of such corporation for at least one month before such will be passed."

In the Constitution of Missouri, which was adopted on October 30, 1875, no provision is found reserving to the State any power to alter or amend charters which

have been previously granted to corporations or those which may thereafter be granted, and no amendments to this Constitution, now in force, contain any such reservation or provision.

It appears, then, that, under the general laws of the Constitution of the State of Missouri, no charter ever granted to any railroad company by that State has been subject to amendment or repeal; but, on the contrary, each and every charter has contained the express assurance that the State could not so amend or repeal as to impair the rights of companies previously organized.

The laws which existed at the time of the incorporation of the railroad company must be considered as a part of the charter granted to the company, and the company may be assumed to have accepted its charter in connection with the laws then existing, and no subsequent act of the Legislature can deprive the railroad company of any of its rights so obtained, whether the loss to the company be great or small, unless such act can properly be classified as falling within the police power of the State. In the case of United States vs. Quincy, 4 Wallace, 535, the Court said:

> "It is also well settled that the laws which subsisted at the time and place of making a contract, and where it is to be performed, entered into and became a part of it as if they were expressly referred to or incorporated in terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement."

The common law of Missouri, as it existed at the time of the incorporation of the railroad company, permitted recovery for damages occasioned by sparks thrown by a locomotive engine only upon proof of negligence of the corporation owning and operating the engine. It is of no importance here to argue the question whether

the State might have, upon granting the charter, imposed a condition to the effect of the statute in question, for this the State did not do.

The right to operate a railroad by steam is a valuable franchise and is not conferred by the State except upon compensation received in return; *i. e.*, benefits accruing to the public at large by reason of the exercise by the corporation of its franchise. It is reasonable to suppose that the Legislature, at the time of granting the charter, must have been fully aware of the danger arising from the operation of railroads by steam, and it would have been a simpler matter, if it was desired that absolute liability should attach to the company for any fire set out by its locomotives, to impose such a condition upon granting the charter. Not having done so, however, it is reasonable and right to suppose that the railroad company assumed the rights given by its charter with the duty imposed upon it by the law then existing, to operate its road with all proper care and to respond in damages in case of its failure to so operate. The degree in which any privilege conveyed by the charter is impaired is immaterial provided such impairment exists at all. In Green vs. Biddle, 8 Wharton, 92, the Court says:

"The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract or dispensing with those which are very minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation." "One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not by the Constitution to be impaired at all. This is not a question

of degree or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."

In Edwards vs. Kersey, 96 U. S., 607, Justice SWAYNE, reading the opinion of the Court, said :

"At common law the duty imposed upon railway companies was to operate their roads, using due diligence and such appliances had proved themselves most advantageous for procuring safety in operation." "A railroad corporation authorized by law to work its engines in the usual and proper way, and when necessary in the exercise of its right to send forth particles of fire from them, is not liable for injuries caused thereby to private property, provided it exercised this right in a lawful manner and with reasonable skill" (Pierce on Railroads, 431).

"The duty of the company to use reasonable skill to avoid injury resulting to others from the exercise of its powers requires it to avail itself of the best mechanical contrivances and inventions known to practical use which are effective in preventing the burning of private property by the escape of sparks and coals from its engines, and it is liable for injuries caused by its omission to use them. This duty in this respect is limited to such contrivances as have been already tested and put in use, and it is not required to use every possible contrivance, although already patented and recommended in scientific discussions" (Pierce on Railroads, p. 433).

In the case of Smith vs. Railroad (37 Missouri, 295) the Court said :

"The rule is well stated in Wharton on Negligence (Section 668), where the author says : 'The Legislature says : "This is an essential industry. You are authorized to engage in it, and it is necessary that your engines should be driven by fire and steam. You are authorized to use fire and steam in your engines." ' "

In Burroughs vs. Railroad (15 Conn., 128) the Court says :

"All they have done, then, must be lawful, if the Legislature should make it so. Where, then, is the

wrong ? In what respect does it differ from a similar injury from a spark from a dwelling house ? In either case the spark proceeds from a reasonable use of one's own property. If there be no fault in the one case, how can there be in the other ? "

The common law as it existed at the time of the incorporation of the railroad company has been shown above. The State gave to the railroad company permission to operate its road by steam and imposed upon it the duty of using proper care in doing so, and at the same time said that, if this duty was observed and performed, the railroad company would be lawfully exercising its rights, and should not suffer for so doing.

In attempting to show that the ancient common law on this subject is different from that stated above some Courts have attempted to compare railway corporations with the owners of vicious animals and those having on their premises and under their control explosive substances or nuisances. The comparison is manifestly unjust, for the reason that the business of carrying on and conducting a railroad is authorized by law, and, if properly carried on, is an entirely legal enterprise, originating and continuing under the sanction of the State. How, then, can the decisions applying to the unauthorized use and control of dangerous and illegal agencies be justly cited as precedents in determining the responsibility of one carrying on a business under authority conferred by the State ? This comparison, however, is made by the Supreme Court of Missouri in the case of Matthews vs. the St. Louis and San Francisco Ry. Co., 24 Southwestern Reporter. We repeat that the law in force at the time the company was chartered authorized railroad companies to use steam without being responsible for damages by fire set

out by their locomotives without proof of negligence, and we insist that these decisions, representing the law as it then existed, entered into and formed a part of the contract, as evidenced by the charter, as much as if it had been therein expressly inserted, and that the law in question is invalid and unconstitutional because it imposes a burden upon the railway company directly inconsistent with one of the valuable franchises conferred upon it by its charter. It violates a contract.

In Mosher vs. R. R. Co., 8 Barbour, 477, it was held that authority to use steam engines impliedly gives the authority to make noise.

In Rood vs. Railway Company, 18 Barb., 37, it was held that the authority to use a steam engine carried with it the authority to emit sparks.

"Speaking generally it may be said that every valuable privilege conferred upon incorporators which conduces to the acceptance of a charter, and organization thereunder, constitutes a contract."

In Bull vs. Railway Company, 4 Har. (Delaware), 401, defendant was given the right to bridge a stream. Afterwards an act was passed giving certain property owners the right to recover damages against the defendant for putting up an obstruction. It was held that the act was void because, the power to build having been given, the right to recover subsequently conferred imposed a burden and was a violation of the contract.

The State of Illinois passed a law making railroad companies absolutely liable for the burial expenses of those persons who were killed on their trains or by their engines. This law was held unconstitutional in the case of Railroad Company vs. Lackey, 78 Illinois, 57, and the Court said :

" It may very pertinently be asked why this distinction? On what principle is it that railroad corporations, without any fault on their part, shall be compelled to pay charges which in other cases are borne by the property of the deceased? The running of trains is lawful and of great public benefit. There is neither reason nor justice in it."

In the case of Lake Michigan, &c., vs. Russell Cemetery (70 Illinois, 196) the defendant was given a right to use certain lands as a cemetery, and thereupon enclosed a portion of those lands. Upon subsequently attempting to enclose additional lands covered by the grant an act was passed prohibiting the use of such additional land for cemetery purposes. The Court construed the act and said:

" By this act of the General Assembly it was intended to prohibit absolutely the use of the grounds by the company for burial purposes. The act of granting the charter was itself a legislative construction that a cemetery is not necessarily a nuisance if the grounds are well selected and interments made with proper care. The General Assembly has the right to pass laws to regulate interments to prevent injury to the health of the community, and, notwithstanding the company in this instance is exercising franchises conferred by the State, it is within legislative control in this regard. The State cannot, under the pretense of making police regulations, repeal its charter and revoke its franchises or deprive the company of any of the essential rights conferred by its charter."

The State of Missouri by the enactment of its laws providing for the incorporation of railway companies invited the investment of money for that purpose and agreed to confer certain privileges and powers upon certain conditions and the assumption by the companies incorporated of certain liabilities and obligations. Various persons taking advantage of the invitation thus extended, and recognizing the values of the

franchises promised, not the least of which was permission to operate by steam, incorporated under its laws and obtained charters from the State. In determining for themselves and the companies thus incorporated what privileges would be conferred and what liabilities assumed, such persons examined the only source from which such information could be derived, to wit, the statutes under which they incorporated and those applicable to railroad companies, and the common law of the State as it then existed and as set forth in the judicial decisions of the Courts. Upon such examination it appeared that the privilege to operate by steam was granted and that the liability to respond in damages for negligence in so operating was imposed. This privilege and obligation was assumed by the railway company in its contract with the State, and both should be preserved intact and cannot be disturbed by subsequent legislation.

Police Power.

The only ground upon which it is conceivable that the constitutionality of the statute in question can be upheld is that the Legislature in enacting it did so under the authority of the police power of the State. It is proper, therefore, that we should discuss at some length the question whether this statute can be sustained as a police regulation.

The police power of the State is inherent in it to provide by regulation such safeguards as may best protect the safety, morals and health of the community. The fundamental basis on which it stands is the maxim, *sic utere tuo ut alienum non lædas.*

Various definitions have been given to this power, but none better than that contained in Cooley's work on Constitutional Limitations at page 572:

"The police of a State, in a comprehensive sense, embraces its system of internal regulation by which it is sought not only to preserve public order and to prevent offenses against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good conduct which are contemplated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as reasonably consistent with the like enjoyment of rights by others."

And further at page 573:

"According to the maxim, *sic utere*, &c., which, being of universal application, it must, of course, be within the range of legislative action to define the mode or manner in which every one may so use his own as not to injure others."

And, further, at page 576:

"The limit to the exercise of the police power in these cases must be this: the regulations must have reference to the comfort, safety or welfare of society. They *must not be in conflict with any of the provisions of the charter*, and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact and not amendments of the charter in curtailment of the corporate franchises."

No case can be found in which it has been held that this power has been used to impose an absolute liability or penalty for the doing of a lawful act. On the contrary, in every instance of the rated exercise of the police power, a regulation has been laid down and a method prescribed for the use of property or a rule of conduct imposed. In the present case the statute imposes no duty and prescribes no regulation. It does

not lay down any rule which the railroad company is bound to observe. Indeed, the lawful manner in which locomotive engines shall be operated is the same to-day after the enactment of this statute as it was by common law at the time of the granting of the charter.

The maxim quoted above intends to protect the property of persons from the unlawful use of the property of others; and also is meant to apply in the case of two innocent parties for the protection of the one who has suffered, yet it has been held that in a case similar to the one at bar, recovery could not be had under its authority. Broom on Legal Maxims, page 394:

"We may add that where an accident happens entirely from a superior agency and without default on the part of the defendant or negligence imputable to him, an action for injury resulting from such accident cannot be maintained. A carrier, though an insurer, is not liable for damages arising from an inherent defect in the chattels delivered him to be carried, NOR WILL *a railway company be liable for an accident arising from the fire in a locomotive engine which they have been authorized by the Leoislature to use, provided every due precaution be taken consistent with its use.*"

See, also,

Jones vs. Railroad Company, L. R. P. Q. B., 733.

Vaughn vs. Railroad Company, 5 H. & N., 679.

Railroad Company vs. Brant, L. R., 4 H. L., 171, 201–2.

Tiedeman on Limitations of Police Power, p. 584.

"As in all other cases in the exercise of the police power, the police regulations of corporations must be confined to the enforcement of the maxim *sic utere tuo*, &c., subject to the observance of which every corporate charter must be supposed to have been granted. Any

attempt under guise of police regulations to repeal or amend the charter or to abridge any of the corporate rights or privileges, would, of course, be unconstitutional and void. The property of the corporation cannot be confiscated under pretense of being a police regulation without payment of compensation. While it is permissible to prohibit a corporation from doing a thing or engaging in the business for which it was created, no law can make the corporation responsible for the damages suffered by the public as a consequence of what the corporation was authorized to do. Thus, for example, where the Legislature authorized the construction of a bridge over a navigable stream of such dimensions that it would necessarily become an obstruction to the navigation of the river the Bridge Company could not be made responsible to those whose navigation of the stream was impaired, for that would in effect be a deprivation of the corporate rights."

The statute in question is not in the nature of a police regulation for the reason that it is not a regulation at all. Argument has been made that the business of a railroad corporation is essentially a dangerous one, and that it is fully within the power of the Legislature to say how its business may be carried on. Granting, for the sake of argument, that this be true, does the statute in question contain any expression as to the manner in which locomotive engines may be operated? No rule of this character is prescribed, but, on the contrary, the Legislature says to the railroad company: "It makes no difference, as regards the liability incurred by you, whether in the operation of your locomotive engines you use care or not, we will prescribe no rule which you must observe, and, even though you have exercised the greatest care and have used the best appliances which are known to the scientific world for preventing the escape of sparks from your locomotive engines, although you are without fault in fact and in law, and are using your property

lawfully, observing every precaution that such use may not operate to the injury of others, still we will impose a penalty upon you from which you cannot escape." Too much stress cannot be laid upon this point, and a careful observation of all cases in which the police powers of the State have been upheld by this Court, fails to disclose a single case in which an attempt has been made to impose an absolute liability for the doing of a lawful act. On the contrary in every instance a regulation has been prescribed, and we earnestly contend that in the present case this element, which is a fundamental attribute of a police regulation and without which a police regulation fails to be a regulation at all, is entirely absent, and for this reason, if on no other ground, the constitutionality of the statute in question cannot be upheld. Many cases are cited in favor of the constitutionality of this statute which have reference to so-called fencing statutes; that is, statutes which provide that railway companies shall fence their tracks, and in case that they do not that they shall be liable for injuries suffered by animals straying upon the track. The attempt to compare such statutes with the one in question is absolutely without merit. In the fencing cases the statutes, the constitutionality of which are upheld on the ground that they are police regulations, imposed a certain duty upon the railroad companies and prescribed a rule of operation which they should observe, and then impose a liability in the nature of a penalty for the non-performance of such regulation, but in the statute in question no duty whatever is imposed.

An attempt to infer a duty from the liability imposed by a statute is impossible. An argument of this nature was made in the case of Samuel vs. Railroad Company,

51 Iowa, 346, and the Court said: "There is no higher degree of care than faultlessness."

Ubi jus ibi remedium; a remedy exists only for a wrong. Recovery can only be had when a duty is violated, and the character of the wrong and duty must be, not a moral, but a legal one. Where in this case is the duty found? Not in the charter or laws in effect at the time of the granting of the charter, nor in any subsequent statute, including the one in question, unless a duty can be inferred from this statute; and, if so, what is that duty? Is it the duty of persons operating locomotive engines to run them in such a manner that sparks cannot be thrown from the smoke-stack? If so, this is a physical impossibility according to our present scientific knowledge. It has baffled inventive genius. And can it be said that the statute imposing upon a corporation already existing and authorized under the laws a duty the performance of which is absolutely a physical impossibility does not impair the obligations of the contract entered into between the corporation and the State? For, if steam locomotives cannot be operated without this result, they cannot be operated at all; and, if the law imposes a duty upon railroad companies to operate only such steam locomotives as may not in any event emit sparks, and if such operation is impossible, is it not apparent that the value of the company's charter and its franchise to operate a railroad by steam is seriously if not fatally impaired?

Police regulations are merely preventive in their nature; their function is to prevent possible injury; they are made up of two component parts, which must necessarily appear, namely, a duty imposed and a penalty attached for its violation. The statute in ques-

tion, lacking all of these essential attributes, cannot be upheld as a police regulation.

It is claimed also that if the railroad company has done no wrong, neither has the property owner, and that it is not right that the latter, any more than the former, should suffer by reason of his faultlessness. This argument is fully answered by an inquiry into the true meaning of the mixim *sic utere*, etc., as set forth above, but this much may further be added: The benefits accruing to owners' property adjacent to railroads are, as a matter of common knowledge, greatly in excess of the disadvantages and injuries which such property owners incur. The case of O. & Miss. R. R. Co. vs. Lackey, 78 Ill., 57, is strongly in point. The statute there before the Court provided for the burial, at the expense of the railroad company, of all persons dying upon their cars, or killed by collision or accident, in the operation of the railroad, and the Court held such statute to be unconstitutional and void, saying:

"It may very pertinently be asked, why this distinction? On what principle is it that railroad corporations, without any default on their part, shall be compelled to pay charges which in other cases are borne by the county in which the accident occurred? An examination of the section will show that no default or negligence of any kind need be established by the railroad company, but that they are mulcted in heavy charges if, notwithstanding all their care and attention, a death should occur on one of their cars, no matter how caused, even by the party's own hand. Running of trains of these corporations is lawful and of great public benefit. It is not claimed that the liability attaches for the violation of any law, the omission of any duty, or the want of proper care or skill in running their trains. * * * I say a penalty, for it is in the

nature of a penalty, and there is a constitutional inhibition against imposing penalties where no law has been violated or duty neglected. Neither is pretended in this case, nor are they in the contemplation of the statute."

In the case last cited the distinction is clearly made between a liability imposed for the nonperformance of a duty prescribed by a police regulation and a penalty imposed for the violation of no prescribed duty.

Laws enacted in the interest of the public welfare or safety, prescribing salutary regulations of the use of property, and attaching penalties to the violation of duties thus enjoined, are undoubtedly valid and constitutional, as within the proper exercise and scope of the police power of the State ; but such laws will readily be distinguished from the statute in question, which does not impose a duty in which the public is largely interested, which, in fact, imposes no duty at all, lays down no rule of conduct whatever, but imposes an absolute and inevitable penalty upon a party guilty of failure to comply with any known requirement of law. It has been well said that " a law that lays down no rule of conduct, that neither commands nor forbids, can not be a police regulation." It is obviously a misnomer and an absurdity to style that law a police regulation which regulates nothing, but merely creates a liability and imposes a penalty irrespective of the breach of any rule of conduct.

The statute which provides no rule of conduct, but which merely creates a liability ; which prescribes no standard or test of compliance with its purpose, from the penalty of which there are no means of exemption ; which contains no recital or suggestion beyond the arbitrary imposing of an inevitable penalty, and which

lays its special burdens upon railroad companies alone, without a pretense of proper basis of classification, does not disclose the ordinary motives and indispensable attributes of a police regulation.

The Court below upholds the constitutionality of this statute upon the authority of the decision in the case of Mathews vs. The Railway Co., and gives as an additional reason that the statute in question is properly a remedial one. For the reasons already given on this point, we dispute the soundness of such a contention, and we fail to see how any statue can be properly construed as remedial which gives no new remedy.

The Court further reiterates the statement made in the Mathews case, that at common law damage caused by fire was recoverable without proof of negligence. Though not disputing this assertion, still, for the reasons already given, we contend that it can have no application to this case, inasmuch as the common law of this country has uniformly provided that a different rule obtains in reference to railroad corporations.

On account of the similarity between this case and the Mathews case case above cited, and also on account of the elaborate opinion in that latter case given in the Court below, it may be permitted and fitting that such opinion be referred to at some length. The underlying ground on which the recovery was allowed in the case and constitutionality of the statute upheld seems to have been the maxim *sic utere tuo ut alienum non lædas*, and instances have already been cited in which this maxim was held not to apply in a similar state of facts. The Court below also cites many cases which deal with the construction and constitutionalty of the so-called "fencing" statutes, and, comparing such statutes with the one in question, argues from

such a comparison for the constitutionality of this statute. Such cases are :

Gorman vs. Railroad Co., 26 Mo., 44.
Thorpe vs. Railroad Co., 27 Vt., 140.
Railway Co. vs. McClelland, 25 Ill., 140.

All of these cases are quoted at length by the court below, but none of them are in point, for the reason already given, and which we now reiterate, to wit : a fencing statute prescribes a regulation ; the statute in question does not ; a fencing statute, it is true, imposes a liability, but only in case of a violation of the duty imposed in the same statute ; the statute in question resembles the fencing statute in imposing a liability, but differs from it in prescribing no rule of conduct. In other words, the fencing statutes are police regulations ; the statute in question is not a regulation at all.

The court below also cites the decisions of the courts in other States which have upheld the constitutionality of statutes similar in their nature to the one under discussion. In many of the cases so cited the question of the constitutionality of the statute was not brought directly to the attention of the Court, and many decisions were rendered upon other grounds ; but, in any event, we are unable to find any construction put upon such statutes by this Court, and we consider the effect of the judicial decisions of other States not to be controlling in this Court.

The Court below, while citing the case of Rhodemacher vs. Railroad Co., 41 Iowa, 297, as a case determining the constitutionality of a similar statute, fails to note that the decision in that case was practically reversed by the same Court in the case of Small vs. Railroad Co., 50 Iowa, 340.

Although various reasons are given by the Court below for upholding the constitutionality of this statute, the one which seems to be controlling and upon which the Court virtually bases its decision is expressed by the Court when it says:

"It [the State] has the right, in order to guard the property of its citizens along these roads, to adopt regulations from time to time as the necessity may require. The State has and can have no higher function than the duty of providing for the safety of its citizens and their property. All laws and all charters are passed subject to this duty wherever it may arise."

In this expression of the learned Judge we most heartily agree, but again repeat the contention, so often made above in this argument, that the *regulations* to which the learned Judge refers are not to be found in this statute.

The Statute is not Remedial.

Argument is also made that the constitutionality of the statute in question should be upheld for the reason that the statute is in its nature a remedial statute, but an examination into the character of remedial statutes will show that this contention has no merit. Statutes which are remedial in their nature are those which give a new and additional remedy for a right already in existence. No remedial statute has ever been construed as such which made no change in the remedy, but created a new right and applied to it a remedy already in existence. In the present case this is what the Legislature has done. It has granted no new remedy for the enforcement of a legal right but has applied the exist-

ing remedy in cases of negligence when there was no violation of the legal duty.

Laws also may be passed which make alterations in the rules of evidence, but the Legislature has no power to pass laws of this character which go beyond this purpose and in making new rules of evidence create a new penalty or liability.

"But there are fixed bounds to the power of the Legislature over this subject which cannot be exceeded. * * * It has no power to establish rules which under pretense of regulating the presentation of evidence go so far as altogether to preclude a party from respecting his rights."

Cooley on Constitutional Limitations, page 368.

"It is a general rule that no one has a vested right to be protected against consequential injuries arising from the proper exercise of rights by others."

Id., p. 384. See also Broom's Legal Maxims, p. 185; Sedgwick on Damages, pp. 30 and 112.

II.

The Statute denies to defendant the equal protection of the laws.

Argument has been made that, owing to the peculiar character of railroad companies and the many elements of danger which enter into their operation, the Legislature has the right to pass laws which may impose upon such companies obligations and liabilities designated to apply to railroad companies alone, and this contention is undoubtedly true to a certain extent; but

it is only true in so far as laws of this nature have reference to such rights and powers as are exercised by railroad companies alone, and it is true to this extent, not only in regard to railroad companies, but also in regard to any other forms of business exercising rights and powers which are in their nature peculiar to such business. Laws which attempt to restrict such rights and powers of railroad companies as are not possessed by them alone, but which rights and powers are common to corporations carrying on other kinds of business, do not extend to all persons within the meaning of the 14th Amendment the equal protection of the laws. The right to use steam is not a privilege exclusively possessed by railroad companies, but, on the contrary, is one exercised by almost every kind of manufacturing concern. The danger of sparks escaping from the chimney of an iron mill is as great as the danger of their escape from the smokestack of a locomotive engine, and the consequences arising from such escape would, in all probability, be much more serious in the former instance than in the latter, for the reason that railroads for many miles run through uninhabited and barren districts, where, in case fire did escape from the engines, no serious harm would be done, and the probable injury to property would be far less than that which would occur in case of sparks thrown from the chimney of a manufactory situated in the heart of a large city. It is not giving to all persons the equal protection of the laws when from all companies carrying on various kinds of business in a lawful and authorized manner the selection of one class of such companies is made, and upon them the liability is imposed for a wrong which they have not committed, and such an artificial

classification is not within the power of the Legislature to make, and cannot be sustained on any grounds of fairness or reason. This law cannot be sustained, because it does not give to railroad companies that protection in the use of steam which it gives to companies carrying on other forms of business, and which are also permitted to use steam.

Pearson vs. Portland, 69 Maine, 269.
State vs. Hunt, 81 Mo., 586.
Railway Company vs. Morris, 60 Mississippi, 641.
Slaughter House Case, 16 Wallace, 36.
Railroad Tax Cases, 13 Fed. Rep., 722.
Santa Clare County vs. Railroad Company, 118 U. S., 394.

The term "equal protection of the laws," as used in the Constitution, has been thus defined by Mr. Justice FIELD:

"The Fourteenth Amendment to the Constitution, in declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the State which can touch the individual or his property, including among them that of taxation. Whatever the State may do it cannot deprive any one within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them to every one on similar terms—in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the Courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. Unequal exactions in every form, or under any pretense, are absolutely forbidden."

Later on, in the same opinion, the same learned Justice applied these principles to corporations in the following language:

"In the second place, the State, in the creation of corporations, or in amending their charters, or, rather, in passing or amending general laws under which corporations may be formed and altered, possesses no power to withdraw them when created, or by amendment, from the guaranties of the Federal Constitution. It cannot impose the condition * * * that they shall submit without objection to unequal and oppressive burdens arbitrarily imposed upon them; that, in other words, over them and their property the State may exercise unlimited and irresponsible power. Whatever the State may do, even with the creations of its own will, it must do in subordination to the inhibitions of the Federal Constitution. * * * But whatever property the corporations acquire in the exercise of the capacities conferred, they hold under the same guaranties which protect the property of individuals from spoliation. It cannot be taken for public use without compensation. It cannot be taken without due process of law; nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances."

In the case of Ah Fong, 3 Sawy., 144, 157, he said:

"Equality of privilege is the constitutional right of all citizens, and equality of protection is the constitutional right of all persons. And equality of protection implies not only equal accessibility to the Courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others of the same class from all charges and burdens of every kind. Within these limits the power of the State exists, as it did previously to the adoption of the amendment, over all matters of internal police."

In the case of Walley's Heirs vs. Kennedy, 2 Yerg. 554, the Court said:

"The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circum-

stances; and every private or partial law which directly proposes to destroy or affect individual right, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void."

Corporations equally with individuals are persons within the meaning of the Fourteenth Amendment.

Santa Clara Co. vs. Southern Pac. R. R. Co., 118 U. S., 396.
U. S. vs. Devaux, 5 Cranch, 86.
Marshall vs. B. & O. R. R. Co., 16 How., 326.
Fertilizer Co. vs. Hyde Park, 3 Biss., 481.
Railroad Co. vs. Richmond, 96 U. S., 529.
Railroad Co. vs. Gibbes, 142 U. S., 386.

Although attempts have been made, and particularly in the opinion of the Court below in the case of Matthews vs. The Railway Co., submitted with this case, to show that at common law railroad companies were absolutely liable for all damages resulting from fires originating by sparks thrown from locomotive engines, we contend that the decisions of the Courts upon this subject do not in any respect bear out this conclusion. On the contrary, as has been shown above, the common law of the State of Missouri, and of most of the other States, as well as the law laid down by this Court, declares that, in the case of fires having such an origin, railroad companies are only liable upon proof of their negligence.

Class Legislation.

We further insist that the statute in question is in derogation of the common law, and that the inference from fire in its relation to its use by individuals as applied to railroad companies expressly authorized to

use this element in carrying on their lawful business is not a fair one. The artificial classification laid down by this statute is partial, discriminating and unequal, notwithstanding it may operate equally upon all within the class thus arbitrarily selected.

The argument has been made that, so long as the law in question applies equally to corporations operating railroads by steam, it extends to all persons the equal protection of the laws, and is uniform in its operation. This argument, however, is superficial for the following reason: While it is undoubtedly true that all steam railroad companies in the State of Missouri are equally affected by the statute in question, yet the railroad companies of the State of Missouri are a small proportion of the corporations organized under the laws of that State which use fire and steam in the carrying on of their lawful business. As has been shown above, the statute in question does not deal with such powers and privileges as are given only to railroad companies; if it did, the classification which is attempted to be imposed might be considered as reasonable; but it deals rather with a privilege which is exercised and enjoyed by a very large class of persons and corporations, and attempts to impose upon certain corporations within this class a liability and penalty not imposed upon others within the same class. This is undoubtedly unequal legislation.

Mr. Justice SAWYER, in his concurring opinion in the railroad tax cases above cited, uses the following language to show the evil results which might arise from a false and artificial classification:

"If the arbitrary discrimination and classification found in this case can be legally made under the Constitution and the law of the land, then the Constitution

or the law can be so framed as to dispose of a man's right in property of all kinds by arbitrary classification and definition, without regard to the real facts, circumstances or condition of the property. A person may be classified and defined out of the equal protection of the law, and, if so, with reference to this provision, he can also be classified and defined out of uniformity in the operation of the law in other particulars; out of the protection of due process of law and of the provision forbidding a law impairing the obligation of contracts, or taking property for public use without just compensation, and, indeed, out of all the guarantees of the Constitution, State or national."

The statute in question withdraws a defense from railroad companies which every other person, corporate or individual, carrying on a business with the use of steam, may assert. In cases arising upon the statute, railroad companies are denied "the right to resort, on the same terms with others, to the courts of the country for the security of their property."

III.

The statute takes the property of the defendant without due process of law.

Due process of law has been defined as the "law of the land." A "law which hears before it condemns, proceeds upon inquiry and gives judgment only after trial." It is a law which in respect to common privileges gives common protection. It discriminates against no class of persons or corporations, but gives to all persons who may share the common right or privilege the same protection, and it does not mean a law which prescribes a

penalty and punishes a person for doing that which he is expressly authorized to do by the sovereign power of the State. In the case already cited of Railroad Company vs. Lackey, *supra*, the law then brought in question was declared to be unconstitutional on the ground, among others, that such law was not due process of law. In Zeigler vs. Railroad, 58 Ala. (p.), the statute claimed to be unconstitutional was one which imposed upon railroad corporations a liability for all damages to live stock caused by their locomotives or trains without reference to the skill or diligence with which the train was operated, and the Supreme Court of that State, in holding such a law to be unconstitutional, said as follows:

"It results that no matter what care, prudence, watchfulness and skill which those having charge of a train may employ, still if damage to live stock be caused by the train the railroad corporation is responsible unless the person owning such live stock contribute to the injury, but permitting live stock to run at large shall not be considered as contributing to such injury. It is obvious that under this statute the highest diligence could not avoid frequent injuries to live stock for which the corporation would be held accountable though the act be unconstitutional. Two facts and two only are required to be shown to authorize a recovery of ownership of the property and injury from locomotive or cars of the railroad. The graver injury of capacity and diligence in the conduct of the train the law assumes to determine or dispense with. Is this due process of law under Section 7 of the Declaration of Rights? * * * Judge COOLEY, in his work on Constitutional Limitations, quotes the definition of the phrase 'Due process of law' as given by Mr. Webster in the case of Dartmouth College vs. Woodward, as follows: 'By law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection

of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance clearly inoperative and void. Judges would sit to execute legislative judgments and decrees, not to declare the law or to administer the justice of the country." In another place, during the same argument, speaking of the powers of the legislature and their separation from the judicial functions of the Government, he said: "It (the legislature) shall not judge by act, it shall not decide by act, it shall not deprive by act, but it shall leave all these things to be tried and judged by the law of the land."

In the case of Hoke vs. Hennery, 4 Dev. Law, 1 and 15, Chief Justice RUFFIN said:

"The terms 'law of the land' do not mean merely an Act of the General Assembly. If they did every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be taken, imprisoned, disseized of his liberties and privileges, be outlawed, exiled and destroyed and be deprived of his property, his liberty and his life without crime? Yet all this he may suffer if an Act of Assembly which applies these penalties on particular persons or a particular class of persons be in itself a law of the land within the sense of the Constitution. For what is in that sense the law of the land must be duly observed by all and enforced by the Courts. The clause itself means that such legislative acts professing themselves directly to punish persons or to deprive the citizen of his property without trial before judicial tribunals and a decision upon the matter be read as determined by the laws under which it rested according to the mode and usages of the common law as derived from our forefathers are not effectually laws of the land for these purposes. The process of law undoubtedly means in the due course of legal proceedings according to its rules and forms which

have been established for the protection of private rights. They were intended to secure the individual from the arbitrary exercise of the powers of Government unrestrained by the established principles of private rights and distributive justice."

We have said above that the Statute under discussion dispenses with all the proof of the most material element of the wrong it seeks to redress. It declares that the railroad corporation shall make reparation for injury inflicted in the authorized prosecution of its lawful business without a semblance of negligence or want of skill in its employees—an injury which no human prudence or foresight could prevent; and yet the State will not allow the railroad company to exculpate itself by proof of the highest qualification, the most watchful vigilance. This falls short of due process of law. But when these very useful corporations conform to this strict rule of diligence we can perceive no reason in law or morals for holding them to a stricter measure of accountability for unavoidable misfortunes than would be expected from natural persons for injuries which would result from unavoidable accident or accidents which no human prudence can foresee or avert.

In Vermont the statute is quite different, and simply places upon the defendant the burden of proving that it was not guilty of negligence.

In Connecticut the law is very much like the one in question, with the single exception that the plaintiff must show himself to be free from fault. In that State only of the New England States has the law been attacked on the ground of its unconstitutionality.

In Colorado the law is similar, and its constitutionality has been upheld in the case of De Busk vs. Railroad Co., 38 A. & E. R. R. C., 321, the Court following

chiefly the case of Rhodemaker vs. Railroad Co., *supra*, which, as we have seen, was subsequently modified by a decision of the same court. The Court in the Colorado case, though upholding the constitutionality of the statute, did not appear to be wholly satisfied in doing so, for it said:

"We see no reason why Colorado should take the lead in declaring such act unconstitutional."

In the case of Miller vs. Martin, 16 Mo., 508, the defendant set fire to certain obstacles on his own land. The fire escaped and burned the plaintiff's property. There was no negligence shown, and the Court held the defendant not liable, saying:

"It must be acknowledged that it is a well-settled principle of our law that, if the party is in the prosecution of a lawful act, an action does not lie for an injury resulting from unavoidable accident, which occurs without fault or blame on his part."

In Railroad Co. vs. Payn, 33 Ark., 819, the Court said:

"Railroads are useful in the community in the development of the resources and increase of the wealth of the State. The exercise of their franchises and the pursuit of their business is lawful, and to hold them liable for unavoidable accidents, which could not have been prevented by due care, is contrary to reason. It is not within the province of the legislature to divest rights by prescribing to the courts what should be conclusive evidence."

IV.

The Federal question was properly saved.

Section 709 of the United States Revised Statutes provides that a final judgment of a State Court may be examined by the United States Supreme Court where the validity of a statute of a State is drawn in question, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity. In Powell vs. Brunswick Co., 150 U. S., 459, the Court says:

> "It is essential to the maintenance of jurisdiction upon the ground of erroneous decision, as to the validity of a State statute or a right under the Constitution of the United States, that it should appear from the record that the validity of such statute was drawn in question as repugnant to the Constitution, and that the decision sustained its validity or that the right was specially set up or claimed, and denied. If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved so that the State Court could not have given judgment without deciding it, that will be sufficient."

The petition in this case stated an action at common law on the ground of negligence, but no evidence was offered tending to establish such negligence, and the defendant was not permitted to prove diligence or show absence of negligence, or to prove contributory negligence on the part of the plaintiff. The trial court, at the request of the plaintiff, charged that the ownership of the property being established, and the fact that it was destroyed by fire, communicated by a locomotive engine in use on defendant's railroad, then the verdict should be for the plaintiff, and the Court

further refused to charge, as requested by the defendant, that negligence on its part must be proved before a verdict for the plaintiff could be sustained. The trial court permitted recovery under the statute in question, and could not have given the judgment which it did without thereby unholding the constitutionality of this statute.

In Water Company vs. Canal Company, 142 U. S., 254, 269, the Court said:

"Notwithstanding the inhibition of the Constitution is not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the Court, it is evident that the Court could not have reached a conclusion adverse to the defendant company without holding either that none of its property had been taken or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law. This Court has had frequent occasion to hold that it is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the State Court (Willson vs. Blackbird Creek March Co., 2 Pet., 245; Armstrong vs. Athens County, 16 Pet., 281; Chicago Life Insurance Co. vs. Needles, 113 U. S., 574; Eureka Lake Co. vs. Yuba County, 116 U. S., 410)."

The Court below, in its opinion (Tr., p. 21), upheld the constitutionality of this statute upon the authority of the case of Matthews vs. The Railway Company, *supra*, and in that case, as it will appear hereafter, the State Court discussed at length the question of the unconstitutionality of this same statute.

It appears, therefore, that even if the Federal question was not put directly in issue by the pleadings in this case, yet, from an examination of the record, it is plainly apparent that the State Court could not have

given its decision without passing upon the Federal question, and this, as shown in the case last cited, is sufficient to give this Court jurisdiction in the case.

The judgment of the Circuit Court of Appeals should be reversed.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Counsel for the Railway Company.

165-28

16528 Jn. 47.53

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 550.

THE WARNER VALLEY STOCK COMPANY, APPELLANT,

vs.

HOKE SMITH, SECRETARY OF THE INTERIOR, AND SILAS W. LAMOREAUX, COMMISSIONER OF THE GENERAL LAND OFFICE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JULY 6, 1896.

1/2 "54.

(16,329.)

(16,329.)

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IN THE

Court of Appeals of the District of Columbia.

THE WARNER VALLEY STOCK COMPANY, Appellant,
vs.
HOKE SMITH, Secretary of the Interior, *et al.* } No. 566.

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a In the Supreme Court of the District of Columbia.

THE WARNER VALLEY STOCK COMPANY (a Corporation), Plaintiff,
vs.
HOKE SMITH, Secretary of the Interior, and Silas W. Lamoreaux, Commissioner of the General Land Office. } In Equity. No. 17083.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

IN THE

Supreme Court, District of Columbia,

THE 15th DAY OF JANUARY, A. D. 1896.

In Equity. No. 17083.

THE WARNER VALLEY STOCK COMPANY (A CORPORATION), PLAINTIFF,

vs.

HOKE SMITH, SECRETARY OF THE INTERIOR, AND SILAS W. LAMOREUX, COMMISSIONER OF THE GENERAL LAND OFFICE.

BILL OF COMPLAINT.

To the Supreme Court of the District of Columbia, holding an equity court:

The plaintiff states as follows:

1. That it is and was at the time of the acts hereinafter complained of a corporation created, organized, and doing business under the laws of the State of Oregon, having its principal place of business at Lakeview, within said State; and it is and was duly empowered to purchase and possess such real estate as it considered necessary to enable it to conveniently carry on the business for which it was incorporated—that is to say, the business of raising cattle for sale—and it brings this suit in its own right.

2. The defendants are both citizens of the United States and residents of the District of Columbia and are sued for acts done and threatened by them in their official capacity respectively.

3. By the act of Congress approved September 28, 1850 (9 Stats. at L., 519), entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits," it was enacted—

"That to enable the State of Arkansas to * * * reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation which shall remain unsold at the passage of this act shall be, and the same are hereby, granted to said State. (§ 1.)

"That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid and transmit the same to the governor of the State of Arkansas, and at the request of said governor cause a patent to be issued to the State therefor, and on that patent the fee-simple of said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof." * * * (§ 2.)

And it was further enacted that in making out the list and plats of the lands aforesaid all legal subdivisions the greater part of which was "wet and unfit for cultivation" should be included in said lists and plats, and when the greater part of a subdivision was not of that character the whole of it should be excluded therefrom (§ 3), and the provisions of the act were extended to and its benefits conferred upon each of the other States in which swamp and overflowed lands known and designated as aforesaid were situated. (§ 4)

4. As soon as practicable after the passage of the said act the Commissioner of the General Land Office, pursuant to the directions of the Secretary of the Interior, transmitted to the governors of the respective States to which the act applied an office circular setting forth the provisions of said act and notifying the respective States or their executive officers to elect which of two methods they would adopt for the purpose of ascertaining and designating the swamp lands within their borders, viz:

(*a*) The field-notes of the Government survey could be

taken as the basis for selections, and all lands shown by them to be swamp and overflowed within the meaning of the act which were otherwise vacant and unappropriated on September 28, 1850, would pass to the State; or

(*b*) The States by their own agents should select the lands after inspection in the field and report the selected tracts to the United States surveyors general in such States, with proof of the swamp and overflowed character thereof.

5. By an act of Congress approved March 12, 1860 (12 Stats. at L., 3), entitled "An act to extend the provisions of 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits' to Minnesota and Oregon, and for other purposes," it was enacted—

"That the provisions of the act of Congress entitled 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,' approved September, twenty-eighth, eighteen hundred and fifty, be, and the same are hereby, extended to the States of Minnesota and Oregon, provided that the grant hereby made shall not include any lands which the Government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of said act."

And it was further enacted thereby that the selections to be made from lands already surveyed in said States should be made within two years from the adjournment of the legislature of such State, at its next session after the date of this act, and, as to all lands thereafter to be surveyed, within two years from such adjournment, at the next session, after notice by the Secretary of the Interior to the governor of the State that the surveys had been completed and confirmed, and the same right of election as to methods of identifying and designating the granted lands were extended to such States of Minnesota and Oregon.

6. Pursuant to such right of election conferred upon the respective grantee States as aforesaid, the State of Oregon elected to make her selections of swamp lands by her own

agents and to present proof that the selected lands were of the character contemplated by the act of Congress, but thereafter, at the request of the State and with the concurrence of the Land Department, it was agreed that the lands inuring to the State under said act should be selected in the field by an agent of the United States acting in conjunction with an agent to be appointed by the State, said agents to jointly examine the lands claimed by the State, to make out lists of such as they found to be of the character described in the act, and, after attaching their affidavits thereto, to transmit the same to the Commissioner of the General Land Office, the report of the two agents, based upon their personal examination of the lands and on such information as they should acquire, supported by their own affidavits, to have controlling effect in the final disposition of the lands, subject, however, of course, to favorable action thereon by the Commissioner of the General Land Office.

7. Under date of January 17, 1887, the Secretary of the Interior directed that the public surveys be extended "throughout the length and breadth of what is termed Lake Warner (in the State of Oregon), or so much thereof as practicable, and thus throw open for disposal under the public land laws lands for which no claim of record can now be made." (5 L. D., 369.)

Pursuant to said instructions, the lands were surveyed by a United States deputy surveyor and the survey was approved and accepted on or about November 6, 1888, and on or about December 6, 1888, the approved plats of survey were filed in the appropriate local offices.

On or about December 29, 1888, the United States surveyor general of Oregon certified to the Commissioner of the General Land Office lists of certain lands, aggregating many thousand acres, included within the above-mentioned survey, designated by the smallest legal subdivisions, part of said lands, more particularly described hereinafter, having been selected by the State of Oregon as swamp and

overflowed lands, the title of which it was alleged had inured to the said State by virtue of the provisions of the acts of Congress above noted.

Copies of said lists were by the Commissioner of the General Land Office sent to the United States special agent at Lakeview, Oregon, and, at the request of the governor of said State of Oregon, it was agreed by and between the officials of the Land Department and of the said State that the examination and report of the said special agent should be accepted by the State and the Federal Government as final and conclusive in so far as the alleged swamp and overflowed character of the selected lands was concerned, it being further agreed, however, that said report was not to operate as a bar to the claims of settlers who might have gone upon said lands under the provisions of the general land laws passed prior to March 12, 1860.

As a result of the various reports made by the agents agreed upon as aforesaid, the claim of the State of Oregon to about 5,200 acres of land, asserted to be swamp and overflowed, but found to be otherwise, was rejected, while to about 22,869 acres of land said claim was allowed and the title thereto confirmed in the State, and as to the balance of about 10,831 acres of land claimed which was reported by the said agents to be of the character contemplated by the acts of Congress aforesaid, *but in the occupation of settlers, the lands hereinafter specified being embraced therein*, the claim of the State was held in abeyance, pending hearings in the local land office, to determine the priority of right as between the said State of Oregon and the said settlers who claimed that the lands here in controversy were at the date of the act of March 12, 1860, "dry lands."

Thereafter, hearings having been had to determine whether the lands involved were of the character contemplated by said acts of Congress and testimony having been submitted, the said lands were declared by the Secretary of the Interior to have been "swamp and overflowed" at the date of the

passage of the act of March 12, 1860, and that the title thereto passed to the said State under the said act; and the claims of said settlers having been denied and dismissed, the Commissioner of the General Land Office, on or about the 21st day of March, 1892, submitted to the then Secretary of the Interior a list of said lands, containing 1,976.5, acres, which list is known and described as Oregon swamp and overflowed lands list No. 30, Lakeview district, the lands embraced in said list being more particularly described as follows:

LIST OF SWAMP AND OVERFLOWED LANDS.

District of Lakeview, Oregon, Willamette Meridian.

Parts of sections.	Sec.	T.	R.	Acres surveyed land.	Acres unsurveyed land.	Total acres.
		S.	*E.*			
Lots No. 2 and 3...	9	39	24	66.63		
N. E. ¼.....	14	39	24	60.00		
E. ½ of N. E. ¼.....	23	39	24	80.00		
E. ½ of N. W. ¼....	23	39	24	80.00		
E. ½ of S. E. ¼.....	23	39	24	80.00		
W. ½..... ..	24	39	24	320.00		
				686.63		
Brought forward.	....	....	..	686.63		
W. ½ of N. E. ¼....	26	39	24	80.00		
E. ½ of N. W. ¼....	26	39	24	80.00		
Lots No. 1 and 2...	27	39	24	67.40		
S. W. ¼ of N. E. ¼.	27	39	24	40.00		
W. ½ of S. E. ¼....	27	39	24	80.00		
S. W. ¼...	27	39	24	160.00		
S. E. ¼.....	28	39	24	160.00		
Lots No. 1, 2, 3, and 4.....	33	39	24	44.90		
Lots No. 5, 6, 7, and 8.....	33	39	24	115.10		
Lots No. 10, 11, and 12.....	33	39	24	116.25		
Lots No. 1, 2, and 3.	34	39	24	66.81	.....	1,797.11
Lots No. 3 and 4...	4	40	24	99.40		
S. ½ of N. W. ¼....	4	40	24	80.00	....	179.40
				1,976.51	.....	1,976.51

at the same time recommending that the said list of selected lands be approved in accordance with law, and thereupon, on the 9th day of April, 1892, the said list was approved by the Secretary of the Interior, and, the local officers having reported that no valid adverse rights to any of the lands embraced in said list existed, the approval thereof was duly noted on the records and tract books of the General Land Office on the 28th day of April, A. D. 1892, and, a certified copy of said list having been forwarded to the governor of the State of Oregon, he, by letter dated May 12, 1892, requested that a patent embracing said lands should be issued to the State, as is shown by Exhibit "A," which is made a part hereof.

Thereafter, other hearings having been had concerning others of said lands as to which the claims of the State of Oregon had been held in abeyance, as aforesaid, and the contests having been terminated and determined in favor of the State of Oregon, the Commissioner of the General Land Office, on or about the 16th day of November, A. D. 1892, prepared and submitted to the Secretary of the Interior a further list of said lands, containing some 2,764.31 acres, which list is known and described as Oregon swamp and overflowed land list No. 31, Lakeview district, the lands embraced herein being more particularly described as follows:

LIST OF SWAMP AND OVERFLOWED LANDS.

District of Lakeview, Oregon, Willamette Meridian.

Parts of sections.	Sec.	T.	R.	Acres surveyed land.	Acres unsurveyed land.	Total acres.
		S.	*E.*			
S. E. ¼ of S. E. ¼	22	39	24	40.00		
N. E. ¼ of S. W. ¼	23	39	24	40.00		
S. ½ of S. W. ¼	23	39	24	80.00		
S. W. ¼ of S. E. ¼	23	39	24	40.00		
N. E. ¼ of S. W. ¼	26	39	24	40.00		
N. ½ of S. E. ¼	26	39	24	80.00		
S. E. ¼ of S. E. ¼	26	39	24	40.00		
Lot 6	27	39	24	22.90		
Lot 1	29	39	24	20.50		
Lot 2	29	39	24	34.41		
Lot 4	34	39	24	30.20		
Lot 5	34	39	24	10.60		
Lot 6	34	39	24	39.97		
Lot 7	34	39	24	52.42		
Lot 8	34	39	24	37.65		
Lot 9	34	39	24	37.75		
S. E. ¼ of N. E. ¼	34	39	24	40.00		
N. ½ of S. E. ¼	34	39	24	80.00		
N. ½ of S. W. ¼	35	39	24	80.00		
Lot 3	35	39	24	37.45		
Lot 4	35	39	24	37.55		921.40
Lot 15	2	40	24	50.32		
Lot 16	2	40	24	50.37		
Lot 17	2	40	24	32.02		
S. W. ¼ of N. E. ¼	2	40	24	40.00		
Lot 1	3	40	24	50.17		
Lot 2	3	40	24	50.12		
Lot 3	3	40	24	50.07		
Lot 4	3	40	24	50.02		
Lot 1	4	40	24	49.95		
Lot 2	4	40	24	49.85		
S. ½ of S. W. ¼	4	40	24	80.00		
S. ½ of S. E. ¼	4	40	24	80.00		
N. ½	9	40	24	320.00		
N. W. ¼	10	40	24	160.00		
S. ½ of N. E. ¼	18	40	24	80.00		
S. E. ¼ of N. W. ¼	18	40	24	40.00		
N. E. ¼ of S. W. ¼	18	40	24	40.00		
N. ½	18	40	24	80.00		
Lot 9	18	40	24	25.90		
Lot 10	18	40	24	31.74		
W. ½ of N. W. ¼	20	40	24	80.00		
W. ½ of S. W. ¼	20	40	24	80.00		1,570.53

List of Swamp and Overflowed Lands—Continued.

Parts of sections.	Sec.	T.	R.	Acres surveyed land.	Acres unsurveyed land.	Total acres.
		S.	*E.*			
Lot 7	30	39	25	38.02		
Lot 8	30	39	25	38.07		
Lot 9	30	39	25	38.12		
Lot 10	30	39	25	38.17	.....	152.38
N. ½ of S. W. ¼	10	33	26	80.00		
S. W. ¼ of S. W. ¼	10	33	26	40.00	....	120.00
Total.	.....	....	..	2,764.31	.....	2,764.31

and recommended that said list of selected lands be approved in accordance with law, and thereupon, on the 3d day of December, A. D. 1892, the said list was by the Secretary of the Interior approved, and such approval was on the 20th day of December, 1892, duly noted upon the official tract books of the General Land Office, as is shown by Exhibit "B," which is made a part hereof; but notwithstanding the approval and certification of said Oregon swamp-land lists numbered thirty (30) and thirty-one (31), and notwithstanding the various requests that patents for the lands embraced therein might be issued, patents have not been issued for the lands included in said lists or either of them, the alleged reason for the failure to issue the same being more fully set forth hereinafter.

8. The State of Oregon, by an act of its legislature passed in 1862 (Deady's Code, 1872; Laws of Oregon, 629), provided for the appointment of a land commissioner, with authority to locate and identify all lands to which the State of Oregon was entitled under various grants from the United States, including the swamp-land grant, and by a further act of its legislature approved October 26, 1870 (Session Laws, 1870, p. 54), additional provision was made for the selection, location, identification, and sale of the swamp and overflowed

lands granted as aforesaid, and all of the lands hereinbefore described having been, in accordance with the said legislative acts, identified and selected as "swamp and overflowed lands" and having been listed for sale as such, the same were, with the exception of the following tracts, viz:

Lots 2 and 3,	sec. 9,	T'p 39 S.,	R. 24 E.
Lots 1 " 2,	" 2,	"	"
S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$,	" 27,	"	"
W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$,	" 27,	"	"
S. W. $\frac{1}{4}$,	" 27,	"	"
S. E. $\frac{1}{4}$,	" 28,	"	"
Lots 1 and 2,	" 29,	"	"

Lots 1, 2, 3, 4, 5, 6, 7, and 8, sec. 33, T'p 39 S., R. 24 E., and lots 1, 2, and 3, sec. 34, T'p 39 S., R. 24 E.,

for a large and valuable consideration, to wit, the sum of one (1) dollar per acre, on the 3d day of April, A. D. 1884, sold in fee-simple to one H. C. Owens, and a certificate of sale of said lands, duly executed under the great seal of the State by the governor, the secretary of State, and the treasurer of the State of Oregon, *ex officio* swamp-land commissioners, having been delivered to him and duly recorded in accordance with law, he, the said Owens, did then and there enter into possession of the lands so sold and conveyed to him.

And thereafter—that is, on the 8th day of April, 1884, the said H. C. Owens, for a large and valuable consideration, sold and conveyed, by a good and sufficient deed in fee-simple, the said lands and all right, title, and interest therein unto one Charles N. Felton and duly assigned unto the said Felton the said certificate of purchase.

And thereafter—that is, on the 15th day of October, 1884—the said Felton, for a large and valuable consideration, by good and sufficient deed sold and conveyed in fee-simple all his right, title, and interest in said lands to one Richard F. McConnaughy.

The excepted lands in this paragraph above specified were by good and sufficient deeds, dated the 8th of January, 1883, and 23d of March, 1893, respectively, for a large and valuable consideration, conveyed by the officers of the State above enumerated, under the great seal of the State, and in accordance with law sold and conveyed in fee-simple to R. F. McConnaughy and Martin McConnaughy.

And thereafter—that is, on the 15th day of January, A. D. 1892—the said Martin McConnaughy, R. F. McConnaughy, and Mattie McConnaughy, his wife, for a large and valuable consideration, to wit, the sum of four (4) dollars per acre, in gold, first paid, sold and conveyed all of the hereinbefore-described lands in fee-simple to the Warner Valley Stock Company, your orator, as per deed duly recorded on the 4th day of February, A. D. 1892, in Book 9, at page 87, of the Records of Deeds of the County of Lake, in the State of Oregon.

By reason of all the matters and things hereinbefore recited, your orator avers that it was and is a *bona fide* purchaser of said lands in the full sense of that term, and as such merits and is entitled to the protection which courts of equity extend under such circumstances.

9. Thereafter, subsequent to the time when plaintiff became the purchaser of said lands embraced in the said lists Nos. 30 and 31, approved as aforesaid, viz., on the 2d day of March, A. D. 1893, the Secretary of the Interior, without notice of such contemplated action being given to your orator, arbitrarily and without warrant or authority of law, by an order bearing the date above mentioned, undertook to revoke and cancel, and did, so far as he was capable of so doing, revoke and cancel his approval of said Oregon swamp-land lists No. 30 and 31, and directed that steps be taken by the Commissioner of the General Land Office to make said revocation and cancellation effective, and thereafter a protest against such action having been filed by

your orators, wherein it was alleged and pointed out that the said Secretary of the Interior and the Commissioner of the General Land Office were without jurisdiction to make and enforce an order of revocation in the premises, and also a motion having been filed urging the revocation of the said improper and illegal order purporting to revoke and cancel the approval of said swamp-land lists, the said protest and motion were overruled, and the said defendant, Hoke Smith, claiming to act by virtue of the authority of law conferred upon him as Secretary of the Interior, without a hearing or trial and without other information than was afforded by the statements contained in certain *ex parte* affidavits, no opportunity having been granted to your orator for the examination of the affiants, who were persons desirous of obtaining possession of the aforesaid lands then in the possession of your orator, did, on the 19th day of December, 1893, decide and declare that upon the papers before him it appeared that the lands in controversy, being the lands hereinbefore described, "were once covered by a large body of water known as Lake Warner, and that at the date of the grant (March 12, 1860) and the survey (of said lands) all the lands embraced in lists 30 and 31 were covered by this lake, which, according to the testimony of some of the witnesses, was too deep to be forded; that now (December, 1893) almost the entire tract which was formerly the bed of the lake is comparatively dry, and that the recession was quite rapid during the last two years prior to March 30, 1889;" and, further, that "lands covered by an *apparently* permanent body of water at the date of the swamp grant are not of the character contemplated by the grant," and that therefore the State of Oregon had no claim to them under the grant as swamp and overflowed lands; and, further, that—

"It seems that nearly, if not quite, all of the lands aforesaid described by subdivisions in lists 30 and 31 and embraced in this decision are claimed under the pre-emption,

homestead, timber-culture, and desert-land laws by persons who initiated their proceedings in the year 1889; that nearly, if not quite, all of said claims have been contested by the State of Oregon or by persons alleged to be her assignees, and that many decisions have been made in favor of such contestant. (Indeed, it is stated in the printed brief of Messrs. McCrellis, Stockslager and Heard that only fourteen such cases are left in the land office to be disposed of, including two applications to file.) The papers before me are not sufficient to enable me to ascertain the present status of said claims and contests with precision. I therefore direct that you cause all decisions recommending or holding for cancellation entries or declaratory statements upon the ground that the lands in contest were granted to the State of Oregon as swamp and overflowed lands by the act of March 12, 1860, to be set aside and annulled and the cases reinstated; and all contests based upon said ground alone to be dismissed, and that you require all *bona fide* claims to said lands lawfully initiated to be prosecuted and perfected with all due diligence according to law and the rules of practice."

And afterwards your orator, still protesting against the proposed action of the Secretary of the Interior, as evidenced in his said decision, and still urging his want of jurisdiction in the premises, and for the purpose of purging the records of the Interior Department of such improper decision, filed a motion for a review and revocation thereof; but such motion for review and revocation was on the 10th day of October, A. D. 1894, overruled and denied, all of which will the more fully appear from an inspection of the copies of said decisions of December 19, 1893, and October 10, 1894, which are appended hereto, marked Exhibits "C" and "D" respectively, and are hereby made a part of this bill.

10. Your orator is advised, and therefore avers, that the aforesaid act of Congress approved March 12, 1860 (*supra*), constituted a grant *in presenti* to the State of Oregon of "all those swamp and overflowed lands made unfit thereby for cultivation" within its boundaries, the duty of determining

as matter of fact which particular legal subdivisions of land within said State were of the class described in said act and the subsequent identification thereof by lists and plats being by said act imposed upon the Secretary of the Interior, and the Secretary of the Interior determined in the orderly course of business that the hereinbefore-designated lands were of the described class, and having evidenced such determination by approving lists containing accurate descriptions thereof by legal subdivisions, and such approval having been duly noted upon the proper public records, the title to the lands so determined, identified, and listed and hereinbefore described at once became vested in the State of Oregon and took effect by relation as of the date of the granting act, and in the absence of fraud such title became and was indefeasible and inured to the benefit of the said State and of all who claim title to such lands under the State, and, further, when the said Secretary of the Interior in due course of office determined as matter of fact that said lands were "swamp and overflowed" within the meaning of said act and evidenced such determination by approving the lists containing accurate descriptions thereof and such approval had been noted upon the public records, he became with respect to said lands *functus officio*, and was without jurisdiction to review such determination or revoke his approval of said lists. Wherefore your orator avers that the said Secretary of the Interior was without jurisdiction to make the order of March 2, 1893, hereinbefore complained of, and was also without jurisdiction to render the said decision of December 19, 1893; nevertheless, pursuant to said last-mentioned decision and in obedience thereto, the said defendant, Silas W. Lamoreux, Commissioner of the General Land Office, on the 5th day of January, A. D. 1895, promulgated through the register and receiver at Lakeview, Oregon, the decision of the Secretary of the Interior of October 10, 1894, denying your orator's motion for review as aforesaid, and sustaining his said decision of December 19, 1893; and the said defendant, Silas W. Lamoreux, Commissioner of the General

Land Office, on said date instructed the said register and receiver that the claim of the State of Oregon to the above-described lands had that day been rejected, and enjoined upon them to note such rejection upon their office records, and directed the reinstatement of all filings and entries (giving a list thereof) for any of the said lands theretofore canceled for reason of conflict with the claim of the State, and the dismissal of any and all contests between the settlers and the State involving any of said tracts, and further informed them that the filings and entries for said lands in said letter enumerated had been reinstated upon the records of the General Land Office in accordance with the said departmental decision, and directed said officers to note the fact of such reinstatement upon their office records and to advise the parties in interest accordingly, and also returned to said officers the applications of certain other enumerated parties to enter certain of the tracts of land hereinbefore described and included in said Oregon swamp-land lists No. 30 and 31 "for such action as the changed condition of affairs warrants," as will the more fully appear from the copy of the said letter appended hereto, marked "Exhibit E," and made a part hereof.

11. Your orator avers that by reason of the said improvident and illegal actions of the said defendants, Hoke Smith, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office, it is being irreparably damaged in this, that the record title to its lands hereinbefore described has been mutilated, and by reason thereof it has been and is now and until relief shall have been afforded it by this honorable court will continue to be disturbed in its quiet possession and enjoyment thereof, and by reason of the great faith and credit reposed by the general public in the acts and doings of officials of such high degree the title to said lands has by their aforesaid acts become clouded and the

market value thereof has been greatly lessened, and the said defendants have assumed and will continue to assume the right and authority to dispose of said lands notwithstanding your orator's title thereto, and to such end have encouraged and even now are encouraging alleged settlers to make claim thereto under the general land laws, and where the claims and entries of alleged settlers upon said lands have been reinstated, as hereinbefore set forth, the said defendants are encouraging such alleged settlers to go forward and submit proof by way of perfecting such claims and entries, and, notwithstanding the protest of your orator's, duly entered, the said defendants have issued patents for certain of said lands to at least two (2) of such pretended settlers, viz:

A. Cameron, for the S. ½ of N. W. ¼ and lots 4 and 5 of section 34, in township 39 S., of R. 24 east, and to

G. F. Maupin, for the N. W. ¼ of section 9, of township 40 S., of R. 24 east,

and has permitted others of said pretended settlers to submit final proofs in support of their respective filings or entries, and threatens to approve such proofs and to issue patents upon said filings and entries, and, unless restrained from so doing, the said defendants will continue to accept final proofs for said lands hereinbefore described, in violation of your orator's rights in the premises and to its lasting and irreparable damage, for which damage your orator has no adequate remedy otherwise than in a court of equity, for the peaceful possession of its said lands is being interfered with by multitudes of squatters claiming said lands under color of authority from the said defendants, its cattle are driven ~~away~~ astray, and the grass and other products of the soil to which it is entitled are diverted to the use of such squatters. To redress such wrongs and regain and maintain possession of its said lands by actions at law would involve your orator in a multitude of suits and would subject it to the annoyance and unconscionable expense which would necessarily attend the

prosecution of many actions. Wherefore, to remove the cloud upon its title to said lands, to restrain and prevent further damage thereto, to regain possession thereof, and to avoid a multiplicity of suits, and for such other and further relief as in the premises may seem just and right, your orator invokes the protection of this court of equity.

12. Your orator avers that the lands hereinbefore described were in faith and fact on March 12, 1860, and prior thereto "swamp and overflowed lands, made thereby unfit for cultivation," within the meaning of the granting acts of September 28, 1850, and March 12, 1860 (*supra*), and as such were public lands of the United States, subject to survey, and they were on the 17th day of January, A. D. 1887 (5 L. D., 369), by the then Secretary of the Interior ordered to be surveyed and the plats of survey thereof were duly approved in the months of May and June, A. D. 1888.

Said lands were not in truth and fact on March 12, 1860, the bed of a lake, nor were they then covered by a permanent body of water, but, on the contrary, they were, as above stated, "swamp lands," and the supposed rapid recession of the waters referred to in the decision of December 19, 1893, was the result of ditching and draining by means of canals and otherwise, instituted by the predecessors in title of your orator; but if it were true, as in said decision it is stated, that said lands were at the date of said granting act (March 12, 1860) covered by the apparently permanent waters of Lake Warner, which waters have since receded, leaving said lands dry, your orator is advised and believes, and therefore avers, that the so-called Lake Warner was a non-navigable lake, and that the title to each and every legal subdivision of shore land adjacent thereto had prior and long prior to the recession of the said waters passed out of the United States and become vested in the State of Oregon, and by mesne conveyances has since become vested in your orator. Wherefore it is alleged that the title to the

lands under the waters of said lake passed with said adjacent or shore lands to the State of Oregon, with the full power in said State to dispose of the same, and the same has been by the said State disposed of to your orator's predecessors in title for a large and valuable consideration, and by mesne conveyances for value the same has become vested in your orator. Wherefore your orator is advised and alleges that said lands have not since the said 12th day of March, 1860, been public lands of the United States subject to disposal and sale under the general land laws.

13. To the end, therefore, that the said Hoke Smith, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office, their subordinates and agents, may be restrained and enjoined from assuming to exercise further jurisdiction with respect to the disposition of lands described in Oregon swamp-land lists No. 30 and No. 31, and from further trespassing upon your orator's right of quiet possession thereof, and that said defendant, Hoke Smith, may be commanded and enjoined to prepare for issuance unto your orator, in accordance with law, patents for said lands, and to the end that your orator's title to said lands may be quieted and freed from cloud, and that such other and further relief may be administered unto your orator as the peculiar necessities and circumstances of the case may require and merit:

May the writ of subpœna issue unto the said Hoke Smith, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office, commanding each of them to appear by a day therein to be fixed, &c., &c., &c.

And your orator will ever pray.

THE WARNER VALLEY STOCK COMPANY,
By CHARLES A. COGSWELL, *President.*

S. F. PHILLIPS,
FREDERIC D. MCKENNEY,
Solicitors for Plaintiff.

DISTRICT OF COLUMBIA, *ss:*

I, George M. Kober, being first duly sworn, depose and say that I am a director of the Warner Valley Cattle Company (a corporation); that I have read the foregoing bill of complaint and know well the contents thereof, and the statements of fact in said bill of complaint contained are true.

GEORGE M. KOBER.

Subscribed and sworn to before me this 13th day of January, A. D. 1896.

R. H. EVANS, [SEAL.]
Notary Public, D. C.

[Endorsed:] Filed January 15th, 1896. John R. Young. Clerk

EXHIBITS.

EXHIBIT "A."

(4–297.)

Division K.

OREGON SWAMP AND OVERFLOWED LANDS.

Approved April 9, 1892.

List No. 30, *District of Lakeview.*

A list of swamp and overflowed lands selected by the State of Oregon under the provisions of the act of Congress approved March 12, 1860, in the land district of Lakeview, containing 1,976.51 acres.

The approval of this list revoked and canceled by the Secretary of the Interior March 2, 1893 $\frac{(1893)}{(23098)}$. Decision promulgated March 8, 1893.

S. W. S.

Certified copy sent to the register and receiver May 4, 1892.
R. & R. report no conflicts May 17, 1892 (67,075–92).
Certified copy sent to the governor, May 4, 1892.
Approval noted on selection records, April 28, 1892.
Approval noted on tract books, April 28, 1892.
The governor requested patent by letter dated May 12, 1892.
Patent No. —, issued ——, 189–.
Patent No. —, posted on selection record, ——, 189–.
Patent No. —, transmitted to the governor, ——, 189–.
Notice sent of issue of patent to the register and the receiver, ——, 189–.
The governor acknowledged receipt of patent by letter dated ——, 189–.

LIST OF SWAMP AND OVERFLOWED LANDS.

District of Lakeview, Oregon, Willamette Meridian.

Parts of sections.	Sec.	T.	R.	Acres surveyed land.	Acres unsurveyed land.	Total acres.
		S.	*E.*			
Lots No. 2 and 3...	9	39	24	66.65		
N. E. ¼.....	14	39	24	160.00		
E. ½ of N. E. ¼.....	23	39	24	80.00		
E. ½ of N. W. ¼ ...	23	39	24	80.00		
E. ½ of S. E. ¼.....	23	39	24	80.00		
W. ½.....	24	39	24	320.00		
W. ½ of N. E. ¼....	26	39	24	80.00		
E. ½ of N. W. ¼....	26	39	24	80.00		
Lots No. 1 and 2...	27	39	24	67.40		
S. W. ¼ of N. E. ¼.	27	39	24	40.00		
W. ½ of S. E. ¼....	27	39	24	80.00		
S. W. ¼.....	27	39	24	160.00		
S. E. ¼.....	28	39	24	160.00		
Lots No. 1, 2, 3, and 4.....	33	39	24	44.90		
Lots No. 5, 6, 7, and 8.....	33	39	24	115.10		
Lots No. 10, 11, and 12.....	33	39	24	116.25		
Lots No. 1, 2, and 3.	34	39	24	66.81	... .	1,797.11
Lots No. 3 and 4...	4	40	24	99.40		
S. ½ of N. W. ¼....	4	40	24	80.00	.....	179.40
				1,976.51	.....	1,976.51

GENERAL LAND OFFICE,
DIVISION OF SWAMP LANDS,
WASHINGTON, D. C., *March* 19, 1892.

This certifies that the foregoing tracts of land, containing one thousand nine hundred and seventy-six and fifty-one hundredths (1,976.51) acres, are claimed by the State of Oregon under the provisions of the act of Congress approved September 28, 1850 (9 U. S. Stat., 519), as extended to that State by the act of March 12, 1860 (12 U. S. Stat., 3); that the character of the same as swamp and overflowed lands has been established by the joint report of an agent of this office and one on the part of the State, and also by the result of hearings duly held for that purpose. Upon examination of the tract books of this office the claim of the State is found free from conflict by sale or otherwise, and under date of

March 1, 1892, the register of the district land office at Lakeview reported that no claims adverse to that of the State for the tracts aforesaid appeared of record in his office.

SAM'L W. SNOW,
Examining Clerk.
EDMOND MALLET,
Chief of Division.

GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 21, 1892.

The foregoing list of swamp and overflowed lands, containing one thousand nine hundred and seventy-six and fifty-one hundredths (1,976.51) acres, is respectfully submitted to the Secretary of the Interior and the approval of the same recommended.

THOS. H. CARTER, *Commissioner.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *April 9th*, 1892.

The foregoing list of swamp-land selections, containing one thousand nine hundred and seventy-six and fifty-one hundredths (1,976.51) acres, is hereby approved, subject to any valid adverse rights that may exist to the tracts of land therein described.

JOHN W. NOBLE, *Secretary.*
G. C.

The approval of this list revoked and canceled by the Secretary of the Interior March 2, 1893 $\frac{(1893)}{(23098)}$. Decision promulgated March 8, 1893.

S. W. S.

I, S. W. Lamoreux, Commissioner of the General Land Office, certify that the foregoing is a true copy of approved list No. 30 of swamp and overflowed lands selected as inuring to the State of Oregon under the provisions of the act of Congress approved March 12, 1860, in the district of lands subject to sale at Lakeview, Oregon, as the same appears on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land [SEAL.] Office to be affixed, at the city of Washington, the 29th day of January, 1895.

S. W. LAMOREUX, *Commissioner.*

EXHIBIT "B."

(4–297.)

Division K.

OREGON SWAMP AND OVERFLOWED LANDS.

Approved Dec. 3, 1892.

List No. 31, *District of Lakeview.*

A list of swamp and overflowed lands selected by the State of Oregon under the provisions of the act of Congress approved March 12, 1860, in the land district of Lakeview, containing 2,764.31 acres.

The approval of this list revoked and canceled by the Secretary of the Interior March 2, 1893 $\frac{(1893)}{(23098)}$. Decision promulgated March 8, 1893.

S. W. S.

Certified copy sent to the register and the receiver, ——, 189–.
Certified copy sent to the governor, ——, 189–.
Approval noted on selection records, December 9, 1892.
Approval noted on tract books, Dec. 20, 1892, M. T. B.
The governor requested patent by letter dated ——, 189–.
Patent No. —, issued ——, 189–.
Patent No. —, posted on selection record, —— 189–.
Patent No. —, transmitted to the governor, ——, 189–.
Notice sent of issue of patent to the register and the receiver, ——, 189–.
The governor acknowledged receipt of patent by letter dated ——, 189–.

1139 b–500.

LIST OF SWAMP AND OVERFLOWED LANDS.

District of Lakeview, Oregon, Willamette Meridian.

Parts of sections.	Sec.	T.	R.	Acres surveyed land.	Acres unsurveyed land.	Total acres.
		S.	E.			
S. E. ¼ of S. E. ¼	22	39	24	40.00		
N. E. ¼ of S. W. ¼	23	39	24	40.00		
S. ½ of S. W. ¼	23	39	24	80.00		
S. W. ¼ of S. E. ¼	23	39	24	40.00		
N. E. ¼ of S. W. ¼	26	39	24	40.00		
N. ½ of S. E. ¼	26	39	24	80.00		
S. E. ¼ of S. E. ¼	26	39	24	40.00		
Lot 6	27	39	24	22.90		
Lot 1	29	39	24	20.50		
Lot 2	29	39	24	34.41		
Lot 4	34	39	24	30.20		
Lot 5	34	39	24	10.60		
Lot 6	34	39	24	39.97		
Lot 7	34	39	24	52.42		
Lot 8	34	39	24	37.65		
Lot 9	34	39	24	37.75		
S. E. ¼ of N. E. ¼	34	39	24	40.00		
N. ½ of S. E. ¼	34	39	24	80.00		
N. ½ of S. W. ¼	35	39	24	80.00		
Lot 3	35	39	24	37.45		
Lot 4	35	39	24	37.55		921.40
Lot 15	2	40	24	50.32		
Lot 16	2	40	24	50.37		
Lot 17	2	40	24	32.02		
S. W. ¼ of N. E. ¼	2	40	24	40.00		
Lot 1	3	40	24	50.17		
Lot 2	3	40	24	50.12		
Lot 3	3	40	24	50.07		
Lot 4	3	40	24	50.02		
Lot 1	4	40	24	49.95		
Lot 2	4	40	24	49.85		
S. ½ of S. W. ¼	4	40	24	80.00		
S. ½ of S. E. ¼	4	40	24	80.00		
N. ½	9	40	24	320.00		
N. W. ¼	10	40	24	160.00		
S. ½ of N. E. ¼	18	40	24	80.00		
S. E. ¼ of N. W. ¼	18	40	24	40.00		
N. E. ¼ of S. W. ¼	18	40	24	40.00		
N. ½ of S. E. ¼	18	40	24	80.00		
Lot 9	18	40	24	25.90		
Lot 10	18	40	24	31.74		
W. ½ of N. W. ¼	20	40	24	80.00		
W. ½ of S. W. ¼	20	40	24	80.00		1,570.53

List of Swamp and Overflowed Lands—Continued.

Parts of sections.	Sec.	T.	R.	Acres surveyed land.	Acres unsurveyed land.	Total acres.
		S.	*E.*			
Lot 7	30	39	25	38.02		
Lot 8	30	39	25	38.07		
Lot 9	30	39	25	38.12		
Lot 10	30	39	25	38.17		152.38
N. ½ of S. W. ¼	10	33	26	80.00		
S. W. ¼ of S. W. ¼	10	33	26	40.00		120.00
Total				2,764.31		2,764.31

GENERAL LAND OFFICE,
DIVISION OF SWAMP LANDS,
WASHINGTON, D. C., *Nov.* 15, 1892.

This certifies that the foregoing tracts of land, containing two thousand seven hundred and sixty-four and thirty-one hundredths (2,764.31) acres, are claimed by the State of Oregon under the provisions of the act of Congress approved September 28, 1850 (9 U. S. Stat., 519), as extended to said State by the act of March 12, 1860 (12 U. S. Stat., 3); that the character of the same as swamp and overflowed lands has been established by the joint report of an agent of this office and one on the part of the State, and also by the result of hearings duly held for that purpose.

Upon examination of the tract books of this office the claim of the State is found free from conflict by sale or otherwise.

SAM'L W. SNOW,
Examining Clerk.
EDMOND MALLET,
Chief of Division.

GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 16, 1892.

The foregoing list of swamp and overflowed lands, containing two thousand seven hundred and sixty-four and thirty-one hundredths (2,764.31) acres, is respectfully sub-

mitted to the Secretary of the Interior and the approval of the same recommended.

W. M. STONE,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *December* 3, 1892.

The foregoing list of swamp-land selections, containing two thousand seven hundred and sixty-four and thirty-one hundredths (2,764.31) acres, is hereby approved, subject to any valid adverse rights that may exist to any of the tracts therein described.

JOHN W. NOBLE, *Secretary.*
G. C.

The approval of this list revoked and canceled by the Secretary of the Interior March 2, 1893 $\frac{(1893)}{(23098)}$. Decision promulgated March 8, 1893.

S. W. S.

I, S. W. Lamoreux, Commissioner of the General Land Office, certify that the foregoing is a true copy of approved list No. 31 of swamp and overflowed lands selected as inuring to the State of Oregon under the provisions of the act of Congress approved March 12, 1860, in the district of lands subject to sale at Lakeview, Oregon, as the same appears on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land [SEAL.] Office to be affixed, at the city of Washington, the 29th day of January, 1895.

S. W. LAMOREUX,
Commissioner.

EXHIBIT "C."

W. H. A., A. M., M. C. McN., E. H. H.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May* 2, 1895.

Pursuant to section 882 of the Revised Statutes I hereby certify that the annexed papers are true copies of the originals as they appear of record in this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department [SEAL.] of the Interior to be affixed the day and year first above written.

WM. H. SIMS,
Acting Secretary of the Interior.

1–480. E. W.

11512–1892. J. I. H., E. F. B., J. L., V. B.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *December* 19, 1893.

J. L. MORROW *et al.* *vs.* THE STATE OF OREGON, R. F. MCCONNAUGHY, *et al.* } Oregon Swamp Land Lists Nos. 30 & 31. Supervisory Jurisdiction.

The Commissioner of the General Land Office.

SIR: On December 29, 1892, John Mullan, Esq., as counsel for J. L. Morrow *et al.*, filed in this Department a petition, addressed to the Secretary of the Interior, praying him to exercise his supervisory jurisdiction over certain proceedings had and being had in respect to 4,740.82 acres of public land lying in Warner valley, Lake county, Oregon, and described in lists Nos. 30 and 31 of swamp and overflowed lands selected by the State of Oregon under the provisions of the act of March 12, 1860, and of General Land Office circulars of November 21, 1850, and April 18, 1882, in the land district of Lakeview, Oregon. Copies of said petition and of eight exhibits filed therewith were served upon the

governor of the State of Oregon. Said lists Nos. 30 and 31 had been approved by Secretary Noble himself on April 9, 1892, and December 3, 1892, respectively, "subject to any valid adverse right that may exist to any of the tracts therein described."

On January 9, 1893, the Secretary took cognizance of said petition and transmitted it to your office for your information and report thereon, and directed that you issue no patents to the State of Oregon for lands within "said surveys" until further advised by this Department. You were also instructed to transmit with your report all motions and protests filed by counsel against the approval of said list No. 31.

On January 23, 1893, James B. McCrellis, as "attorney for R. F. McConnaughy *et al.*, assignees of the State of Oregon," filed in this Department a petition addressed to the Secretary of the Interior praying that orders be issued to patent to the State of Oregon the lands described in said list No. 30. A copy of said petition was served upon Mr. Mullan.

On the same day, January 23, 1893, Messrs. John Mullan and Jos. K. McCammon, as "counsel for the heirs of Emma Neasham, George F. Maupin, Jesse B. Morrow, and J. L. Morrow *et al.*, dry-land claimants," filed in this Department a supplemental statement, with twenty-three exhibits attached thereto, in further support of Mullan's petition filed December 29, 1892. Service of said petition was acknowledged by Mr. James B. McCrellis, as attorney for the assignees of Oregon.

On January 24, 1893, your office made report as required by said departmental letter of January 9, 1893, and transmitted therewith fifteen files of papers.

On February 10, 1893, Messrs. Mullan and McCammon filed in this Department another voluminous statement, with ten exhibits attached thereto, and service of same was acknowledged by Mr. McCrellis.

On March 2, 1893, my predecessor, on consideration of your report aforesaid and the accompanying papers "and other charges and allegations made in certain papers filed here," since his former letter, by Messrs. McCammon and Mullan, was "of opinion that all action tending to the approval or patenting of lands to said State embraced in the Neal survey should be further suspended;" and in his letter

to your office of that date he revoked and canceled his own approval of said swamp-land lists Nos. 30 and 31 and directed you to take proper steps to make said revocation and cancellation formally effective. He also directed you at once to make full report to this Department in relation to all matters set forth by Messrs. McCammon and Mullan so far as the same came within the cognizance of your office, transmitting here all papers relating to said matters, that the same might be fully considered and proper directions given in the premises.

By your letter "K" of March 13, 1893, you made the report required by my predecessor and transmitted therewith twenty-four files of papers deemed by yourself pertinent. With your letter "K" of March 27, 1893, you transmitted plats of surveys, documents, and papers, collected in files and marked by the letters of the alphabet from A to M, inclusive, the same being papers which Messrs. Mullan and McCammon, on one side, and Mr. McCrellis, on the other, deemed pertinent, and desired to have transmitted for consideration by the Secretary.

With your letters of April 6 and April 19, 1893, you transmitted other papers which were deemed by your office or by counsel as pertinent and proper to be considered by the Secretary.

Between March 2 and August 2, 1893, Messrs. Mullan and McCammon, attorneys for Morrow and others, have filed eight papers, and Mr. McCrellis and Messrs. Stockslager and Heard, as attorneys for R. F. McConnaughy and others, assignees of the State of Oregon, have filed six papers, containing arguments, statements, and affidavits in support of their several contentions, of all which both sides have had notice.

And now, with all parties interested present here by counsel, duly notified and fully heard, and after careful examination and supervision of the great mass of papers before me, containing all the information accumulated during many years of eager, intelligent, and industrious contest, I proceed to make such decisions and give such directions as appear to me to be lawful, right, and proper.

The lands involved in the pending controversy are embraced in lists Nos. 30 and 31 of swamp and overflowed lands which had been selected by the State of Oregon in Lakeview land district, and which lists were approved by

the Secretary of the Interior on April 9, 1892, and December 3, 1892, respectively, subject to any valid adverse rights that might exist as to any of the tracts therein described.

When these lists were presented to the Secretary of the Interior for his approval they appeared to be clear lists of swamp and overflowed lands, to which were attached the certificates of the clerk of the swamp-land division and the Commissioner of the General Land Office certifying that said lands were swamp and overflowed within the meaning of the act of September 28, 1850, and that upon examination of the tract books of that office the claim of the State had been found to be free from conflict by sale or otherwise. Upon these certificates the Secretary approved the lists. Subsequently, however, upon information furnished by the Land Office that adverse claims to tracts involved in said lists were then pending in that office and had not been disposed of, and that the character of said lands was contested by adverse claimants, the Secretary directed that the Commissioner retransmit to the Department all the papers in said case; thereupon the Secretary revoked and canceled his approval of said swamp-land lists 30 and 31 and directed the Commissioner to make such revocation and cancellation formal and effective and to make full report to the Department in relation to all of the matters set forth in the petition of the several claimants. Upon the filing of the Commissioner's report thereon counsel for the State and also those for the contestants were notified that they would be permitted to file arguments in said case, and the question now presented by said report is whether said lands were swamp and overflowed within the meaning of the acts of September 28, 1850, and March 12, 1860.

A careful review of the testimony in this case shows beyond all question that the lands involved in this controversy were once covered by a large body of water known as Lake Warner, and that at the date of the grant and of the survey all the lands embraced in lists 30 and 31 were covered by this lake, which, according to the testimony of some of the witnesses, was too deep to be forded, and that between 1874 and 1877 the water began to recede, so that now almost the entire tract which was formerly the bed of the lake is comparatively dry, and that the recession was quite rapid during the last two years prior to March 30, 1889.

The ruling of the Department is that the lands covered

by an apparently permanent body of water at the date of the swamp grant are not of the character contemplated by the grant (State of California, 14 L. D., 253). If this ruling be adhered to in this case, and I see no reason to depart from it, the lands embraced in said lists are clearly not of the character contemplated by the grant, and the State has no claim to them as swamp and overflowed lands.

It seems that nearly, if not quite, all of the lands aforesaid, described by subdivisions in lists 30 and 31 and embraced in this decision, are claimed under the pre-emption, homestead, timber-culture, and desert-land laws by persons who initiated their proceedings in the year 1889; that nearly, if not quite, all of said claims have been contested by the State of Oregon or by persons alleged to be her assignees, and that many decisions have been made in favor of such contestants. Indeed, it is stated in the printed brief of Messrs. McCrellis, Stockslager and Heard that only fourteen such cases are left in the Land Office to be disposed of, including two applications to file. The papers before me are not sufficient to enable me to ascertain the present status of said claims and contests with precision. I therefore direct that you cause all decisions recommending or holding for cancellation entries or declaratory statements, upon the ground that the lands in contest were granted to the State of Oregon as swamp and overflowed lands by the act of March 12, 1860, to be set aside and annulled and the cases reinstated and all contests based upon said ground alone to be dismissed, and that you require all *bona fide* claims to such lands lawfully initiated to be prosecuted and perfected with all due diligence according to law and the rules of practice.

Lists 30 and 31 and all the papers filed in connection therewith are herewith returned.

Very respectfully,

HOKE SMITH,
Secretary.

EXHIBIT "D."

J. I. H., E. F. B., E. M. L., C. W. P.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October* 10, 1894.

J. L. MORROW *et al.* *vs.* THE STATE OF OREGON. } Oregon Swamp Lands. Motions for Review and Rehearing.

The Commissioner of the General Land Office.

SIR: Motions have been filed by James B. McCrellis, Esq., and Messrs. Stockslager and Heard, as counsel for the grantees of the State of Oregon, for a review of the departmental decision of December 9, 1893 (17 L. D., 571), and for a rehearing of the same.

An examination of these motions has rendered it necessary to examine again the voluminous record in the case.

The first ground relied on for review of this decision is that it was without warrant, in that it reversed the rulings of the late Secretary of the Interior upon the character of the land in question, contained in his letters of April 9 and December 3, 1892, respectively.

These rulings were revoked and rescinded by the late Secretary's letter of March 2, 1893, and it was clearly within his recognized authority. State of Michigan (7 L. D., 514), State of Oregon (*id.*, 572).

The second objection is but a corollary of the first and is without force.

The third objection would be conclusive if it were founded in fact, but the record shows that all the parties whose claims are adjudicated are before the Department duly represented by a counsel.

The fourth objection is also obnoxious to the criticism that it is not found in fact.

The fifth objection will be considered in the consideration of the motion for a rehearing.

The sixth and seventh objections are a vain repetition of the objection contained in the first objection.

The eighth objection is without force, for the reason that

the grant is made to the State of Oregon and not to its transferees, and if the State has no title to the lands its tranferees, who stand in its shoes, have no claim to consideration. State of Illinois (10 L. D., 121).

The ninth, tenth, twelfth, and thirteenth objections have been considered, so far as it is necessary to consider them, in the comments on the preceding objections to the decision.

The eleventh objection is not well taken.

These decisions are founded upon the presumption that the lands in controversy are swamp and overflowed lands, which is shown not to be the case. They fail with the decision against the right of the State of Oregon to the land. It is obvious that the motion for a rehearing is based on no solid ground. It is not alleged that the testimony relied on is newly discovered, and no valid reason is given for not producing it before. It is merely additional evidence, and only cumulative, and comes too late to warrant a rehearing.

Cline *vs.* Daul (11 L. D., 565).

Finally, all the voluminous testimony in the case was carefully examined by the Department when the case was before it and has now been again examined, and I find no good reason for reversing the decision upon the evidence. It is not necessary now to recite it. A great number of witnesses testified to facts from which it is a reasonable inference that at the date of the grant to the State of Oregon the land embraced in lists 30 and 31 were covered by the waters of Lake Warner.

For these reasons the motions for review and rehearing are denied, and the departmental decision of December 19, 1893 (17 L. D., 571), is affirmed and sustained.

The papers in the case are herewith returned.

Very respectfully, HOKE SMITH,
Secretary.

[Endorsed:] Exhibit "D."

EXHIBIT "E."

K., R. C. L. 4–207. E. M.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 22, 1895.

I, S. W. Lamoreux, Commissioner of the General Land Office, do hereby certify that the annexed paper, being a copy of the record of a letter from the Commissioner of the General Land Office to the register and the receiver, Lakeview, Oregon, dated January 5, 1895, promulgating the decisions of the Secretary of the Interior in the case of J. L. Morrow *et al. vs.* State of Oregon, is a true and literal exemplification of the record in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

S. W. LAMOREUX,
Commissioner of the General Land Office.

1894 W. O. C. E. M.

107564
"K."
S. W. S.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 5, 1895.

Register and receiver, U. S. land office, Lakeview, Oregon.

SIRS: I inclose herewith a copy of the decision of the Hon. Secretary of the Interior of October 10, 1894, denying the motion for review and rehearing in the case of J. L. Morrow *et al. vs.* The State of Oregon, and sustaining departmental decision of December 19, 1893 (17 L. D., 571).

The decisions of the Department in said case held that lands covered by an apparently permanent body of water on March 12, 1860 (the date the swamp-land act was extended to Oregon) did not pass to the State as swamp lands.

The townships in which Warner lake is situated were surveyed and the lake meandered at different times—one of the townships in 1868, several in 1875, and some in 1880.

In compliance with the instructions contained in depart-

mental decision of January 17, 1887 (5 L. D., 369), a contract was entered into with John H. Neale, deputy surveyor, to extend the public surveys over so much of the so-called lake as was found practicable to survey. A new meander line was established and surveys extended in the following townships, viz:

Township No. 34 south, range No. 24 east.
" " 35 " " " 24 and 25 east.
" " 36 " " " 24 " 25 "
" " 37 " " " 24 " 25 "
" " 38 " " " 24 " 25 "
" " 39 " " " 24 " 25 " and
" " 40 " " " 24 "

Plats of which survey were approved in May and June, 1888.

The areas disclosed by the surveys of Neale, formerly covered by the waters of the lake, are as follows, viz:

	Acres.
Township No. 34 south, range No. 24 east	540.93
" " 35 " " " 24 "	3,788.99
" " 36 " " " 24 "	3,566.30
" " 37 " " " 24 "	1,243.23
" " 38 " " " 24 "	2,010.77
" " 39 " " " 24 "	9,913.36
" " 40 " " " 24 "	9,279.29
" " 35 " " " 25 "	4,168.29
" " 36 " " " 25 "	1,582.36
" " 37 " " " 25 "	716.15
" " 38 " " " 25 "	2,801.70
" " 39 " " " 25 "	2,959.10

On December 29, 1888, the U. S. surveyor general for Oregon approved and forwarded to this office swamp-land lists of selections Nos. 61, 62, and 63 (for 20,449.52, 4,474.70, and 13,433.08 acres respectively), which lists included substantially all of the lands disclosed by the Neale surveys.

The decisions of the Department direct the rejection of the claim of the State under the swamp-land grant to all of the land disclosed by the Neale survey, title to which has

not passed to the State by patent, or the claim to which has not been heretofore rejected.

In accordance with the instructions contained in said decisions the claim of the State, under the swamp grant, to the tracts described below is this day rejected, and you will so note on the records of your office.

The following is a description of such tracts, viz:

	No. of section.	Township south.	Range east.
S. W. ¼ of N. W. ¼ and W. ½ of S. W. ¼	13	35	24
E. ½ of N. W. ¼ and S. W. ¼ of N. W. ¼	23	35	24
N. W. ¼ of N. W. ¼	24	35	24
Lots 1 and 2	3	36	24
E. ½ of N. W. ¼ and E. ½ of S. W. ¼	10	36	24
Lot 1	8	37	24
Lot 11	9	37	24
Lots 6 and 7	35	37	24
Lot 2	1	38	24
Lots 2 and 3	9	39	24
N. E. ¼	14	39	24
S. E. ¼ of S. E. ¼	22	39	24
E. ½ of N. E. ¼ and E. ½ of N. W. ¼	23	39	24
N. E. ¼ of S. W. ¼ and S. ½ of S. W. ¼	23	39	24
N. E. ¼ of S. E. ¼ and S. ½ of S. E. ¼	23	39	24
W. ½	24	39	24
W. ½ of N. E. ¼ and E. ½ of N. W. ¼	26	39	24
N. E. ¼ of S. W. ¼ and N. W. ¼ of S. E. ¼	26	39	24
E. ½ of S. E. ¼	26	39	24
Lot 6	27	39	24
Lots 5, 6, 7, 8, 9, 10, 11, 12	33	39	24
S. ½ of N. E. ¼ and S. ½ of N. W. ¼	33	39	24
N. ½ of S. W. ¼ and N. ½ of S. E. ¼	33	39	24
Lots 4, 5, 6, 7, 8, 9 and S. E. ¼ of N. E. ¼	34	39	24
S. ½ of N. W. ¼ and N. ½ of S. E. ¼	34	39	24
N. W. ¼ and N. ½ of S. W. ¼ and lots 3 and 4	35	39	24
Lot 8	1	40	24
Lots 15, 16, 17 and S. W. ¼ of N. E. ¼	2	40	24
Lots 1, 2, 3, 4	3	40	24
Lots 1, 2, 3, 4 and S. ½ of N. W. ¼	4	40	24

	No. of section.	Township south.	Range east.
S. ½ of S. W. ¼ and S. ½ of S. E. ¼	4	40	24
Lots 1, 2 and S. ½ of N. E. ¼	5	40	24
Lots 5, 8 and N. ½ of S. E. ¼	7	40	24
N. E. ¼, E. ½ of S. W. ¼ and N. W. ¼ of S. W. ¼	8	40	24
N. E. ¼ of S. E. ¼ and S. ½ of S. E. ¼	8	40	24
N. ½ S. W. ¼ and W. ½ of S. E. ¼	9	40	24
N. W. ¼	10	40	24
S. W. ¼ of N. W. ¼ and W. ½ of S. W. ¼	17	40	24
Lots 7, 8, 9, 10, 11, and N. E. ¼	18	40	24
E. ½ of N. W. ¼ and N. E. ¼ of S. W. ¼	18	40	24
N. ½ of S. E. ¼ and S. E. ¼ of S. E. ¼	18	40	24
N. E. ¼ of N. E. ¼ and lot 12	19	40	24
W. ½ of N. W. ¼ and W. ½ of S. W. ¼	20	40	24
N. E. ¼ of N. E. ¼	8	35	25
Lots 6, 7, 8, and S. ½ of S. E. ¼	31	35	25
Lots 3 and 4	32	35	25
Lots 5, 6, 7	19	36	25
Lot 9	31	38	25
Lot 2 and S. E. ¼ of N. W. ¼ and S. ½ of N. E. ¼	19	39	25
Lots 5, 6, 7	20	39	25
Lot 2	29	39	25
Lots 7, 8, 9, and 10	30	39	25
Lots 5, 6, 7, and N. E. ¼ of N. W. ¼	31	39	25

The decisions further direct the reinstatement of all filings or entries for any of the above lands heretofore canceled for reason of conflict with the claim of the State, and the dismissal of any and all contests between the settler(s) and the State involving any of said tracts.

The following are the numbers of such filings and entries, together with the description of the land covered thereby (with the exception of D. S. 3375, A. C. Willey and D. S. 3368 of S. E. Sloan, which will be made the subject of other communications):

No. of D. S.		No. of section.	Township south.	Range east.
3366	N. ½ of S. W. ¼, S. E. ¼ of S. W. ¼ and S. W. ¼ of S. E. ¼	8	40	24
3369	E. ½ of S. E. ¼, sec. 8, and W. ½ of S. W. ¼	9	40	24
3370	N. W. ¼	10	40	24
3371	W. ½ of S. E. ¼ and E. ½ of S. W. ¼	9	40	24
3372	N. W. ¼	9	40	24
3374	N. E. ¼	9	40	24
3376	W. ½ of N. E. ¼ and E. ½ of N. W. ¼	26	39	24
3377	N. E. ¼ of S. W. ¼ and N. ½ of S. E. ¼, and lot 9	18	40	24
3378	Lots 5, 6, 7, and 8	33	39	24
3379	S. ½ of N. E. ¼, S. E. ¼ of N. W. ¼, and lot 2	19	39	25
3380	S. ½ of N. E. ¼, S. E. ¼ of N. W. ¼, and lot 10	18	40	24
3381	S. ½ of N. W. ¼ and lots 4 and 5	34	39	24
3382	S. ½ of N. E. ¼ and S. ½ of N. W. ¼	33	39	24
3387	Lots 1, 2, and 3	3	40	24
3437	Lots 15, 16, 17, and S. W. ¼ of N. E. ¼	2	40	24
3438	N. ½ of S. W. ¼ and lots 3 and 4	35	39	24
3440	Lots 7, 8, 9, and 10	30	39	25
3447	N. E. ¼	8	40	24
3449	S. ½ of S. E. ¼ and S. ½ of S. W. ¼	4	40	24
——	W. ½ of N. W. ¼ and W. ½ of S. W. ¼	20	40	24
T. C.				
991	Lots 8, 9, and N. ½ of S. E. ¼	34	39	24
983	Lots 3 and 4	32	35	25
984	S. W. ¼ of N. W. ¼ and W. ½ of S. W. ¼	17	40	24
1008	E. ½ of S. E. ¼	26	39	24
1015	N. W. ¼	35	39	24
1016	Lots 5, 6, 7, and N. E. ¼ of N. W. ¼	31	39	25
1017	E. ½ of N. E. ¼ and E. ½ of S. E. ¼	23	39	24
1018	W. ½ of N. W. ¼ and W. ½ of S. W. ¼	24	39	24

No. of D. S.		No. of section.	Township south.	Range east.
1022	N. E. ¼	14	39	24
1023	Lots 3, 4, and S. ½ of N. W. ¼	4	40	24
1026	Lots 7 and 8	18	40	24
Homestead.				
1166	Lots 5, 8, and N. ½ of S. E. ¼	7	40	24
1167	N. E. ¼ of S. W. ¼ and N. W. ¼ of S. E. ¼	26	39	24
	And lot 6	27		
1169	N. ½ of S. E. ¼ and N. ½ of S. W. ¼	33	39	24
1170	Lots 1, 6, 7, and S. E. ¼ of N. E. ¼	34	39	24
1171	S. E. ¼ of S. E. ¼	22	39	24
	And S. ½ of S. W. ¼ and S. W. ¼ of S. E. ¼	23		
1172	Lot 4, sec. 3, and lots 1 and 2	4	40	24
1173	N. ½ of N. E. ¼, N. E. ¼ of N. W. ¼, and lot 11	18	40	24
1196	S. E. ¼ of S. E. ¼, sec. 18, N. E. ¼ of N. E. ¼, and lot 12	19	40	24
1220	Lots 6, 7, 8, and S. ½ of S. E. ¼	31	35	25
1303	E. ½ of N. W. ¼ and E. ½ of S. W. ¼	24	39	24
D. L. entry.				
272	Lots 2 and 3	9	39	24

The filings and entries above described are this day reinstated, in accordance with the departmental decisions referred to, and you will so note on the records of your office, advising the parties in interest accordingly.

Should an examination of the records of your office show that any entries or filings have been omitted that should have been included in the above list, you will promptly advise this office of the fact.

I return herewith the applications to enter under the homestead laws of the following-named parties: John Shedd,

J. E. Dunnavan, J. H. Dawson, J. A. Morrow, J. F. Piergue, and W. F. Fisher, whose applications were rejected for the reason that the land applied for was embraced in lists 30 and 31 (which lists were considered in the departmental decisions above referred to), and from which rejections appeals were taken. The applications are returned for such action as the changed condition of affairs warrants.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

(7 enclosures.)

NOTE.—Each of the foregoing exhibits is stamped as follows: "Filed January 15, 1896. John R. Young, clerk."

41 *The Joint and Several Showing of Hoke Smith, Secretary of the Interior, and Silas W. Lamoreaux, Commissioner of the General Land Office, &c.*

Filed February 1, 1896.

In the Supreme Court of the District of Columbia.

THE WARNER VALLEY STOCK COMPANY (a Corporation), Plaintiff, *vs.* HOKE SMITH, Secretary of the Interior, and Silas W. Lamoreaux, Commissioner of the General Land Office, Defendants.	In Equity. No. 17083.

The joint and several showing of Hoke Smith, Secretary of the Interior, and Silas W. Lamoreaux, Commissioner of the General Land Office, the above-named defendants, setting forth cause wherefore the relief prayed by the bill should not be granted.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the bill of complaint filed herein by the Warner Valley Stock Company (a corporation), the above-named plaintiff, contained to be true in such manner and form as the same are therein alleged, hereby show cause, as next hereinafter set forth, wherefore the relief prayed by the bill should not be granted, which showing is made pursuant to the rule of this honorable court, entered herein on January 15, 1896.

1.

That it appears from the said bill of complaint that this honorable court has no jurisdiction over the facts and subject-matter by the plaintiff in its said bill alleged
42 and set forth, nor any jurisdiction over these defendants in and upon the said facts and subject-matter, and in particular it appears that no title, legal or equitable, has vested or been confirmed in the State of Oregon or in the plaintiff, by patent of the United States or otherwise, in a manner complying with the requirements and provisions of the act of Congress approved September 28, 1850 (9 Stats.

at Large, 215), entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits," and the act of Congress approved March 12, 1860 (12 Stats. at Large, 3), entitled "An act to extend the provisions of 'the act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits' to Minnesota and Oregon, and for other purposes," and prior to the vesting and confirmation of title in the State of Oregon or in the plaintiff as aforesaid; that the sole jurisdiction over the facts and subject-matter in the said bill of complaint alleged and set forth is by the provisions of the said acts of September 28, 1850, and March 12, 1860, vested in the Secretary of the Interior.

2.

That it does not appear from the said bill of complaint that the plaintiff herein has such title or interest in or to the lands set forth and described in the said bill or in or to any portion or portions thereof as to enable it to maintain suit against these defendants.

3.

That it appears by the said bill of complaint that the plaintiff is not entitled to the relief prayed by the bill against these defendants.

43

4.

That if the facts and subject-matter alleged and set forth in the said bill of complaint do give the plaintiff any cause of complaint against these defendants the same is triable and determinable at law and ought not to be inquired of by this court, sitting as a court of equity.

5.

That A. Cameron, The State of Oregon, and G. F. Maupin, in the said bill of complaint named, and other persons referred to, but not named in the said bill, and whom these defendants are not now able to name, are by the plaintiff's own showing proper and necessary parties to any suit which may be brought against these defendants in this court touching any of the pretended matter of equity charged in the said bill.

6.

That it appears that the truth of the facts alleged by the plaintiff in its said bill has not been verified in accordance with law.

7.

That the title to swamp and overflowed lands does not pass by the approval and certification of the Secretary or by patent, but by the grant; that the approval and certification by the Secretary is merely an adjudication or determination of the character of the lands, he being the sole tribunal authorized by the act to determine what lands are of the character that pass by the grant, and until the issuance of patent the Secretary of the Interior has jurisdiction and authority to review, revoke, or recall his decisions of his own motion.

44 Wherefore the defendants demand the judgment of this honorable court whether they shall be compelled to make any further or other showing pursuant to the said rule to show cause, and pray to be hence dismissed with their reasonable costs in this behalf most unjustly sustained.

JOHN I. HALL,
Ass't Att'y General,
E. F. BEST,
Solicitors for Defendants.

JOS. K. McCAMMON,
JOHN MULLAN,
JAMES H. HAYDEN,
Of Counsel.

DISTRICT OF COLUMBIA, *ss:*

Hoke Smith and Silas W. Lamoreaux make solemn oath and say that they are the defendants named in the above-entitled suit, and that the foregoing causes in demurrer are not interposed for delay.

HOKE SMITH.
S. W. LAMOREAUX.

Sworn to and subscribed before me this 31st day of January, 1896.

CHARLES L. DU BOIS,
Notary Public.

[SEAL.]

We hereby certify that in our opinion the foregoing causes in demurrer are well founded in point of law.

JOHN I. HALL,
E. F. BEST,
Solicitors for Defendants.

JOS. K. McCAMMON,
JOHN MULLAN,
JAMES H. HAYDEN,
Of Counsel.

45 *Decree.*

Filed March 21, 1896.

In the Supreme Court of the District of Columbia, Holding a Term in Equity.

THE WARNER VALLEY STOCK COMPANY, a Corporation,
vs.
HOKE SMITH, Secretary of the Interior, *et al.*

In Equity. No. 17083.

Decree.

This cause having been set down for argument upon the bill of complaint and exhibits and the demurrer of defendants thereto, an- now, at this term, coming on to be finally heard, it was argued by counsel, and the court being sufficiently advised in the premises, it is, this 21st day of March, A. D. 1896, adjudged, ordered, and decreed that the said demurrer to the bill of complaint be sustained and the injunction prayed for be denied, and the bill of complaint be, and the same is hereby, dismissed with costs to the defendants, to be taxed.

W. S. COX, *J.*

Filed March 21, 1896.

Supreme Court, District of Columbia, January Term, 1896.

THE WARNER VALLEY STOCK COMPANY (a Corporation), Plaintiff, *vs.* HOKE SMITH, Secretary of the Interior, and Silas W. Lamoreaux, Commissioner of the General Land Office.	In Equity. No. 17083.

(March 17, 1896.)

Mr. Justice COX delivered the opinion of the court:

I take it that the differences between an ordinary grant of land by the United States and a legislative grant, like that involved in the present case, are about these: In the former no title passes until the patent is executed. The survey is made and the land is identified, but the patent is the act by which the title is first transferred by the United States. A granting act conveys title to land in general, so to speak, but it does not become a title to any land in particular until the land is identified and patented. When the land is identified and the patent signed it has relation back to the date of the granting act, so as to cut out any intervening rights. Another feature is that in any contest between individuals over land embraced in the grant (if there has been no official identification of the land) the evidence necessary to identify it may be sought from other sources; but in
47 any question directly between an individual, whether a grantee of a State or not, and the Government, I see no reason for the idea that the title shall pass in any sense until execution of a patent.

The language of the Supreme Court in the case of the United States *vs.* Schurz, 102 U. S., 402, is in point on this question. The court says:

"From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

"It is equally clear that this period is at the latest precisely *from* the last act in the series essential to the transfer of the title has been performed. Whenever this takes place the land has ceased to be the land of the Government; or, to speak in technical language, the legal title has passed from the Government, and the power of these officers to deal with it has also passed away."

In this case, as in any other case of a grant of title, the last act is the patent. It is so expressly declared in the law. The law says that "at the request of the governor the Secretary of the Interior shall cause a patent to be issued to the State for the lands, and on that patent the fee-simple of said lands shall vest in the State."

This case differs from that of Noble *vs.* Union River Logging Railroad Company, 147 U. S., 165. That case arose under a law granting to railroad companies the right of way over public lands. It contained a provision that a railroad company seeking to have the benefit of the
48 act shall file with the register of the land office for the district where the land is located a profile of its route, and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all lands over which said right of way shall pass shall be disposed of subject to such right of way.

The final act here was noting the profile, which had been approved by the Secretary of the Interior, upon the plats in the Land Office, and from that moment the right of way was established. No patent was required and no further act needed, and we held, as the Supreme Court did, that that act conclusively vested in the company the right of way.

There is nothing of that sort in the present case. The bill does allege that the list of lands made out by the Secretary of the Interior and forwarded to the governor of the State was noted upon the books of the department, but no law provided for that proceeding. No conclusive or other effect was given to the list itself or to anything else than the final act by which the title was to pass, which was to be the patent.

That being the case, the whole subject necessarily remained under the control of the Secretary until the execution of the patent. No act of his before that time was binding upon him in the sense of being irrevocable. If he com-

mitted mistakes or was led into error, it was his right and duty to correct his mistakes. All the proceedings were *in fieri* until the title has passed.

The language of the Secretary of the Interior cited with approval by the Supreme Court in Knight *vs.* U. S. Land Association, 142 U. S., 178, is pertinent:

49 "When proceedings affecting titles to lands are before the department the power of supervision may be exercised by the Secretary, whether the proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the department in the despatch of business, not to defeat the supervision of the Secretary. For example, if when a patent is about to issue the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him and therefore he was without authority in the matter."

So it seems to me in this case that it is a clear right of the Secretary, notwithstanding the previous approval given to a list of swamp and overflowed lands, to reconsider his approval and cancel the list if deemed by him to be erroneous, and his action in the premises is unassailable collaterally. Therefore the court must deny the injunction prayed for against assuming further jurisdiction with respect to the disposition of lands described in the list set out in the bill.

W. S. COX, *J.*

50 *Appeal.*

WARNER VALLEY STOCK CO. (a Corporation)
vs.
HOKE SMITH, Secretary of the Interior, *et al.* } # 17083.

The clerk will please note an appeal to the Court of Appeals, D. C., from the decree sustaining the demurrer of de-

fendants, denying the injunction prayed for, and dismissing the bill of complaint, and issue citation.

PHILLIPS & McKENNY,
Attorneys for Plaintiff.

Appeal, as ordered, entered.

BY CLERK.

'96, 3, 21.

51 Filed Mar. 25, 1896. J. R. Young, clerk.

In the Supreme Court of the District of Columbia.

THE WARNER VALLEY STOCK COMPANY (a Corporation)	
vs.	No. 17083.
HOKE SMITH, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office.	In Equity.

The President of the United States to Hoke Smith, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal entered in the supreme court of the District of Columbia on the 21st day of March, 1896, wherein The Warner Valley Stock Company is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 21st day of March, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 24 day of March, 1896.

JOHN I. HALL,
E. F. BEST,
Attorneys for Appellees.

52 *Memorandum.*

March 25, 1896.—Bond for appeal filed.

53 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 52, inclusive, to be true copies of originals in cause No. 17083, in equity, wherein The Warner Valley Stock Company (a corporation) is plaintiff and Hoke Smith, Secretary of the Interior, and Silas W. Lameraux, Commissioner of the General Land Office, are defendants, as the same remain upon the files and records of said office.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said Disctrict, this 26th day of March, A. D. 1896.

JOHN R. YOUNG, *Clerk.*

54 In the Court of Appeals of the District of Columbia, April Term, 1896.

THE WARNER VALLEY STOCK COMPANY, Appellant,
vs.
HOKE SMITH, Secretary of the Interior, and SILAS W. LAMOREUX, Commissioner of the General Land Office. } No. 566.

Stipulation.

It is hereby stipulated by and between the attorneys for the parties above named that the transcript of the record from the supreme court of the District of Columbia may be corrected as follows:

On page 4, after the word "as," strike out the word "is."

After the word "laws," strike out the word "and" and insert the word "lands."

After the word "claim," insert the words "of record."

On page 6, in the second line, 5th column, of the schedule there appearing, strike out figure "1."

On page 10, line 13, after the figure "7," insert the word "and."

55 On page 13, line 24, after the word "urging," strike out "the" and insert "his."

On page 36, line 17, after the word "follows," insert "viz."

In the last line thereof, after the word "which," strike out "have" and insert "has."

On page 37, line 18 of the table, after the "S. W. ¼," insert "and" and, after "S. E. ¼," strike out "and."

On page 37, line 21, after figure- "11," strike out "and."

" " " line 26, after "N. W. ¼," insert "and."

" " " line 29, after "3," strike out "and."

On page 38, line 10 of the table, after "N. W. ¼," insert "and," and after "S. W. ¼" strike out "and."

On page 38, line 11, after "N. ½ of S. E. ¼," insert "and."

" " " line 17, after "6," strike out "and."

" " " line 19, after "2," insert "and."

" " " line 20, after "6," strike out "and."

On page 39, line 10 of the table, after "S. W. ¼," insert "and."

PHILLIPS & McKENNEY,
Attorneys for Appellant.
E. F. BEST,
Attorney for Appellees.

[Endorsed:] In the Court of Appeals of the District of Columbia. Equity. No. —. The Warner Valley Stock Company, appellant, *vs.* Hoke Smith, Secretary, and Silas W. Lamoreux, Commissioner. Stipulation. Court of Appeals, District of Columbia. Filed Apr. 2, 1896. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 566. The Warner Valley Stock Company, appellant, *vs.* Hoke Smith, Secretary of the Interior, *et al.* Court of Appeals, District of Columbia. Filed Apr. 2, 1896. Robert Willett, clerk.

51 TUESDAY, *April 28th, A. D.* 1896.

THE WARNER VALLEY STOCK COMPANY, Appellant,
vs.
HOKE SMITH, Secretary of the Interior, and SILAS W. LAMOREUX, Commissioner of the General Land Office. } No. 566.

Upon motion, Mr. J. K. McCammon is allowed to file briefs for certain appellees in this case. The argument in the above-entitled cause was commenced by Mr. F. D. McKenney, attorney for the appellant.

WEDNESDAY, *April 29th, A. D.* 1896.

THE WARNER VALLEY STOCK COMPANY, Appellant,
vs.
HOKE SMITH, Secretary of the Interior, and SILAS W. LAMOREUX, Commissioner of the General Land Office. } No. 566.

The argument in the above-entitled cause was continued by Mr. F. D. McKenney, attorney for the appellant, and by Mr. J. I. Hall, attorney for the appellees, and was concluded by Mr. E. F. Best, attorney for the appellees.

52 THE WARNER VALLEY STOCK COMPANY, Appellant,
vs.
HOKE SMITH, Secretary of the Interior, and SILAS W. LAMOREUX, Commissioner of the General Land Office. } No. 566.

Opinion of Court.

Mr. Justice SHEPARD delivered the opinion of the court:

This is an appeal from a decree sustaining a demurrer to and dismissing appellant's bill for an injunction against the Secretary of the Interior and the Commissioner of the General Land Office.

Appellant claims the title to certain lands under grant from the State of Oregon as swamp lands under the act of September 28, 1850, granting swamp lands to the State of Arkansas; and the act of March 12, 1860, extending the provisions thereof to certain other States, including Oregon.

It appears from the bill and exhibits that the State of Oregon made selections of certain lands, including those in controversy, as "swamp and overflowed lands," under the provisions of the act of Congress. That on January 17, 1887, the Secretary of the Interior directed the public surveys to be made throughout what is termed Lake Warner (embracing the territory in question), and plats of the said survey were filed about December 6, 1888. December 29, 1888, the surveyor general of the United States for Oregon certified to the Commissioner of the General Land Office lists of lands of many thousand acres, including therein parts of the lands that had been selected as above by the State of Oregon. Copies of this list were

sent to the special agent of the United States at Lakeview, Oregon, and the allegation is that it was agreed between the officials of the Land Office and the officials of said State that the report of said special agent should be accepted as final and conclusive in so far as the character of the lands as "swamp and overflowed" was concerned; said report, however, not to operate as a bar to claims of settlers who might have gone on said lands under the provisions of general land laws passed prior to March 12, 1860.

As a result of various reports so made, the claim of the State to 5,200 acres was rejected, and to 22,869 acres was allowed and confirmed; whilst as to 10,831 acres reported as "swamp and overflowed," the claim of the State was held in abeyance, on account of pending claims of settlers. On March 21, 1892, the Commissioner of the General Land Office submitted a list known as No. 30, containing 1,976.51 acres, as having been decided to be "swamp and overflowed," and recommended that the same be approved as belonging to the State, and so forth.

That on April 9, 1892, the local officers having reported that no valid adverse rights to said lands existed, the same was approved by the Secretary of the Interior and noted on the records and tract books of the General Land Office; and a copy sent to the governor of Oregon, who, on May 12, 1892, demanded a patent therefor. Another list, called No. 31, was so reported, approved and certified December 20, 1892.

The certified transcript from the records of the Land Office shows that the certificates were made by the examining clerk and the chief of division, and recites that the tract books of the office show the claim of the State "free from conflict by sale or otherwise;" and also that the register at Lakeview had reported that no claims adverse to that of the State appeared of record in his office. These were submitted by the Commissioner to the Secretary and approval recommended. The approval of the Secretary, made April 9 and December 3, 1892, respectively, reads: "Subject to any valid adverse rights that may exist to the tracts of land therein described." It appears that, on December 29, 1892, certain persons claiming the land, filed a petition with the Secretary praying him to exercise his supervisory jurisdiction in the premises.

On January 9, 1893, the Secretary of the Interior, Hon. John W. Noble, took cognizance of the petition, and at once ordered the Commissioner to issue no patents to the State of Oregon until further advised. On January 23, 1893, counsel for the assignees of the State of Oregon filed a petition asking that said patents be granted. After the filing of certain other papers and affidavits by the opposing claimants, the Secretary was of the opinion that the matter of patent should be suspended for further hearing, and then and there revoked and cancelled his former approval, and ordered the Commissioner to make a full report of all the matters contained in the claim of the settlers and to transmit therewith all papers relating thereto for consideration and further direction.

The report and papers came before the Hon. Hoke Smith, who succeeded Secretary Noble, and were by him considered December 19, 1893. The proceeding was entitled J. L. Morrow *et al. v.* The State of Oregon, R. F. McConoughy *et al.*

The Secretary carefully reviewed all the proceedings in the matter and the evidence touching the issues of the case, and arrived at the conclusion that the lands were not "swamp and overflowed." He found also that "nearly if not quite all the lands aforesaid, described by subdivisions in lists 30 and 31 and embraced in this decision, are claimed under the pre-emption, homestead, timber-culture, and desert-land laws by persons who initiated their proceedings in the year 1889; that nearly, if not quite, all of said claims have been contested by the State of Oregon or by persons alleged to be her assignees, and that many decisions have been made in favor of such contestants."

He was also of opinion that the facts before him were not sufficient to enable him to act advisedly in the pending contest, and therefore ordered all decisions concerning the entries to be set aside and the several cases thereof to be further prosecuted in accordance with law and the practice of the department. On October 10, 1894, he overruled a motion for rehearing made on behalf of the interests claimed by appellant.

The foregoing decision was certified to the register and receiver of the United States land office at Lakeview, Oregon, January 5, 1895, and direction given to them to reinstate the files or entries which had been formerly cancelled as in conflict with the claims of the State of Oregon.

Complainant, denying the right of the Secretary to revoke the approval that had been made of the lists No. 30 and No. 31 aforesaid, filed its bill alleging the facts aforesaid, and the irreparable damage that would be done it by entertaining adverse claims in the department, two of which had already been patented, and so forth.

The prayer is for an injunction to restrain the Secretary and Commissioner "from assuming to exercise further jurisdiction with respect to the disposition of lands described in Oregon swamp-land lists No. 30 and No. 31, and from further trespassing on your
53 orator's right of quiet possession thereof, and that said defendant, Hoke Smith, may be commanded and enjoined to prepare for issuance unto your orator, in accordance with law, patents for said lands," etc.

1. The decision of the main question involved in this appeal depends upon the construction to be given the provisions of the acts of Congress referred to above and the proceedings that have been had thereunder in respect of the lands in the Land Department of the Government.

The original act, approved September 28, 1850, 9 Stat. U. S. 519, grants to the State of Arkansas:

"SEC. 1. The whole of those swamp and overflowed lands made

unfit thereby for cultivation which shall remain unsold at the passage of this act," and declares that they "shall be and are hereby granted to said State."

Section 2, down to a proviso that is unimportant in this case, reads thus:

"SEC. 2. And be it further enacted, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee-simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof."

The act of November 12, 1860, 12 Stat. U. S. 3, extends the provisions of the foregoing act to the States of Minnesota and Oregon (section 1) with the following proviso:

"Provided, that the grant hereby made shall not include any lands which the Government of the United States may have reserved, sold or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act.

"SEC. 2. And be it further enacted, That the selection to be made from lands already surveyed in each of the States including Minnesota and Oregon, under the authority of the act aforesaid and of the act to aid the State of Louisiana in draining the swamp lands therein, approved March second, one thousand eight hundred and forty-nine, shall be made within two years from the adjournment of the legislature of each State at its next session after the date of this act; and, as to all lands hereafter to be surveyed, within two years from such adjournment, at the next session, after notice by the Secretary of the Interior to the governor of the State, that the surveys have been completed and confirmed."

2. We shall pass by some interesting questions that have been presented on the able argument for the appellant, because they are not necessary to be decided, under our view of the case, and will, no doubt, hereafter arise in other courts in which adverse claimants of the land may litigate the title.

Conceding that the statute is itself a grant of all "swamp and overflowed" lands, within her limits, to the State of Oregon, and that the actual issue of a patent is not necessary to the vesting of her right, does not settle the question presented here. Before the title could pass out of the United States to any particular tract of land and become vested in the State of Oregon, or its grantee, to the full extent and with all the rights asserted on behalf of the appellant in this proceeding, two facts must be ascertained: First, is the land selected and claimed "swamp and overflowed" within the meaning of the act of 1850; second, is it such as, within the proviso of the act of 1860, "the Government of the United States may have reserved, sold, or disposed of (in pursuance of any law hereto-

fore enacted) prior to the confirmation of title to be made under the authority of this act?" Heath *v.* Wallace, 138 U. S. 573, 585; McCormick *v.* Hayes, 159 U. S. 332, 339, 343; Barden *v.* N. P. R. R. Co., 154 U. S. 288, 329.

3. The ascertainment of these facts has been entrusted (primarily, at least) to the Land Department, of which the Secretary of the Interior is the head. Whilst engaged therein, the courts have no power to interfere with the exercise of his discretion in the premises by either injunction or mandamus. Gaines *v.* Thompson, 7 Wall. 347, 352; New Orleans *v.* Paine, 147 U. S. 261.

Whether the decision of the Secretary, when made, will be conclusive as to the rights of all claimants to the title, is a question that will arise in litigation that must necessarily be carried on in other courts.

4. The appellant contends, however, that Secretary Noble made the necessary decision when he approved the lists and notified the governor of Oregon; and that he had no power to recall that approval and reopen the controversy.

The question is a difficult one, and it is not without some doubt that we have arrived at the conclusion that the Secretary did have that power. This follows, we think, from the doctrine of the following cases and others referred to in them: Knight *v.* Land Association, 142 U. S. 166, 178; New Orleans *v.* Paine, 147 U. S. 261.

The final act of confirmation of title, referred to in the statute of 1860, must be the patent required to be issued; "and on that patent the fee-simple to said lands shall vest in the said State." Act of 1850, sec. 2.

Secretary Noble, in approving the lists and passing them for patent, acted upon the information, certified to him, that the lands had been found to be "swamp and overflowed" by the report of the agent, and that the claim of the State was found free from conflict by sale or otherwise. He seems to have accepted the certificate, and, in so far as it concerned the status of the land as "swamp and overflowed," to have made his approval without condition; but not so in respect of adverse claims. As to the latter his approval was expressly "subject to any valid adverse rights that may exist to any of the tracts therein described."

Before the expiration of the month in which the second list had been approved, a petition was filed in the department by certain adverse claimants, under other legislation of Congress respecting the public lands, in which the Secretary was advised that there were not only adverse claims, but also that the lands were not in fact "swamp and overflowed." Having reason to believe that he may have been led into error, the Secretary cancelled entirely
54 the approval of the lists, and ordered a full report to be made and submitted to him, with all the papers relating to the matter, for examination and determination of the questions involved.

Before the matter could be finally acted upon, Secretary Noble

retired from office and was succeeded by Secretary Smith. The latter has not revoked an order or reviewed a decision of his predecessor. He has merely taken up the matter, in the course of his duty, as unfinished business of the department. After careful examination, he came to the conclusion, as we have seen, that the said lands were not "swamp and overflowed," within the meaning of the act of Congress; and that they were the subject of claim, by many persons, under pre-emption, homestead, and other laws of the United States. Whether he erred in the foregoing conclusions, is not a question for our determination. If it were, there are no facts presented by the record by which we could determine it.

In recognizing and affirming the act of his predecessor, he seems to have followed the established practice of the department in treating the matter as undecided and subject to new inquiry until the issue of patent.

That practice and the power of the Secretary have been stated by a former Secretary in language that was expressly approved in Knight *v.* Land Association, 142 U. S. 178, as follows: "The statutes, in placing the whole business of the department under the supervision of the Secretary, invest him with the authority to review, reverse, amend, annul, or affirm all proceedings in the department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised, in the absence of statutory direction, may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the department, the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the department in the dispatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that, by reason of some newly ascertained fact, the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow proceedings to be consummated which it would be immediately his duty to ask the Attorney General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him and therefore he was without authority in the matter." 5 Land Dec. 494.

We agree with the learned justice who heard the cause that the case here differs from Noble *v.* Union River Logging R. R. Co., 147

U. S. 165, upon which the appellant strongly relies. "That case," he correctly said, "arose under a law granting to railroad companies the right of way over public lands. It contained a provision that a railroad company seeking to have the benefit of the act shall file with the register of the land office for the district where the land is located a profile of its route, and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all lands over which said right of way shall pass shall be disposed of subject to said right of way. The final act here was noting the profile which had been approved by the Secretary of the Interior upon the plats in the land office, and from that moment the right of way was established." No patent was required by the statute in that case to convey the easement. The right thereto vested upon approval of the profile and the delineation of the right of way upon the plats; and was therefore held beyond recall by a succeeding Secretary.

In this case, the noting of the lists of "swamp and overflowed" lands upon the tract books of the department was not required or provided for by the acts of Congress; but the issue of the patent was expressly provided for as the last act in the series essential to the complete vesting of the title.

We find no error in the decree appealed from, and will therefore affirm it with costs to the appellees.

Affirmed with costs.

55 THURSDAY, *June 11th, A. D.* 1896.

THE WARNER VALLEY STOCK COMPANY, Appellant,
vs.
HOKE SMITH, Secretary of the Interior, and SILAS W. LAMOUEUX, Commissioner of the General Land Office.

No. 566. April Term, 1896.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel; on consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

June 11, 1896.

SATURDAY, *June 13th, A. D.* 1896.

THE WARNER VALLEY STOCK COMPANY, Appellant,
vs.
HOKE SMITH, Secretary of the Interior, and SILAS W. LAMOREUX, Commissioner of the General Land Office. } No. 566.

On motion of Mr. F. D. McKenney, attorney for the appellant in the above-entitled cause, it is ordered by the court that said appellant be allowed an appeal to the Supreme Court of the United States on giving bond in the sum of four hundred dollars.

56 Know all men by these presents that we, The Warner Valley Stock Company, as principal, and George M. Kober and Arthur L. Bryant, as sureties, are held and firmly bound unto Hoke Smith, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office, in the full and just sum of four hundred (400) dollars, to be paid to the said Hoke Smith and Silas W. Lamoreux, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifteenth day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a Court of Appeals of the District of Columbia in a suit depending in said court between The Warner Valley Stock Company, appellant, and Hoke Smith, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office, appellees, a decree was rendered against the said The Warner Valley Stock Company, and the said The Warner Valley Stock Company having, in open court, prayed an appeal and obtained the allowance thereof to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and having obtained a citation, directed to the said Hoke Smith, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said The Warner Valley Stock Company shall prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

THE WARNER VALLEY STOCK CO. [SEAL.]
GEO. M. KOBER. [SEAL.]
ARTHUR L. BRYANT. [SEAL.]

Witness:
N. CURTIS LAMMOND.

Approved by—
R. H. ALVEY, *Chief Justice.*

56½ [Endorsed:] No. 566. The Warner Valley Stock Company, appellant, *vs.* Hoke Smith, Sec'y, &c., *et al.* Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jun- 18, 1896. Robert Willett, clerk.

DISTRICT OF COLUMBIA, *ss:*

George M. Kober, being first duly sworn, upon oath says that he is possessed of real property situate in the District of Columbia worth more than $500 over and above all incumbrances.

GEORGE M. KOBER.

Subscribed and sworn to before me this — day of June, A. D. 1896.

[NOTARIAL SEAL.] N. CURTIS LAMMOND,
Notary Public, D. C.

DISTRICT OF COLUMBIA, *ss:*

Arthur L. Bryant, being first duly sworn, upon oath says that he is possessed of real property situate in the District of Columbia worth more than $500 over and above all incumbrances.

ARTHUR L. BRYANT.

Subscribed and sworn to before me this — day of June, A. D. 1896.

[NOTARIAL SEAL.] N. CURTIS LAMMOND,
Notary Public, D. C.

The above bond is satisfactory.

E. F. BEST,
Solicitor for Def'ts.

57 UNITED STATES OF AMERICA, *ss:*

To Hoke Smith, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The Warner Valley Stock Company is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, chief justice of the Court of Appeals of the District of Columbia, this 18th day of June, in the year of our Lord one thousand eight hundred and ninety-six.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service of the above citation acknowledged this 18th day of June, A. D. 1896.

E. F. BEST,
W. A. LITTLE,
Ass't Att'y Gen'l,
Solicitors for Defendants.

57½ [Endorsed:] Court of Appeals, District of Columbia. Filed Jun- 18, 1896. Robert Willett, clerk.

58 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 57, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The Warner Valley Stock Company, appellant, *vs.* Hoke Smith, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office, No. 566, April term, 1896, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 20th day of June, A. D. 1896.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 16,329. District of Columbia Court of Appeals. Term No., 550. The Warner Valley Stock Company, appellant, *vs.* Hoke Smith, Secretary of the Interior, and Silas W. Lamoreaux, Commissioner of the General Land Office. Filed July 6, 1896.

165-28

Office Supreme Court, U. S.
FILED.
OCT 12 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1896.

No. 550.

THE WARNER VALLEY STOCK COMPANY,
APPELLANT,

vs.

HOKE SMITH, SECRETARY OF THE INTERIOR, AND SILAS W. LAMOREUX, COMMISSIONER OF THE GENERAL LAND OFFICE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO ADVANCE.

Now comes the appellant in the above-entitled cause and moves this Court to advance the same and assign it for argument at an early day. As ground for such motion, it is shown that the action was brought to restrain the defendants, acting in their official capacity, from attempting, under a claim of official right, to dispose of lands, the title to which had, by prior departmental action, become vested in the appellant.

In view of the fact that one of the defendants has already retired from office, and that the term of office for which the

remaining defendant was appointed is rapidly drawing to a close, and will have expired long prior to the time at which this case may reasonably be expected to be reached in its regular order on the docket, it is submitted that the case should be advanced in accordance with the practice in the case of John W. Noble, Secretary of the Interior, *vs.* Union River Logging Railroad Company, appellant, No. 1157, of October term, 1892.

The action being of necessity an action *in personam* for acts threatened to be done by the defendants in their official capacity, it follows that in the absence of statutory provision to the contrary the same must, on the retirement of the present incumbent from office, abate.

U. S. *ex rel.* Lewis *vs.* Boutwell, Secretary, 17 Wall., 604.

In view of this authority it is apparent that the action has heretofore abated in so far as the defendant Hoke Smith, Secretary, etc., is concerned, but the prayer of the bill for an injunction, if granted, as against the remaining defendant in the case at bar will furnish effective relief.

S. F. PHILLIPS,
FREDERIC D. McKENNEY,
Attorneys for the Warner Valley Stock Company.

To the Honorable the Attorney General of the United States:

Please take notice that on Tuesday, the 13th day of October, A. D. 1896, at twelve o'clock noon, or as soon thereafter as counsel can be heard, the above motion will be submitted for the consideration of the Court.

S. F. PHILLIPS,
FREDERIC D. McKENNEY,
Attorneys for the Warner Valley Stock Company.

Service of a copy of the foregoing motion and notice is hereby acknowledged this — day of October, A. D. 1896.

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